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THE REAL SOCIAL SECURITY DISABILITY FRAUD(S)

Steven K. Berenson*

INTRODUCTION

In early January 2014, the Manhattan District Attorney announced the indictment of 106 individuals in conjunction with one of the largest Social Security Disability fraud scams on record.¹ Among those indicted included a lawyer,² a “disability consultant” and a small number of facilitators and recruiters, each of whom used their experience and professional expertise to generate and process the fraudulent claims.³ Those not indicted were doctors who generated false medical opinions in support of the fraudulent claims.⁴ The bulk of the fraudulent claimants were former New York City police officers and firefighters, many of whom also collected disability pensions from the City.⁵ A large number of the claimants alleged that their involvement in responding to the September 11, 2001, terrorist attacks led them to suffer from Post-Traumatic Stress Disorder (PTSD) and other mental health problems.⁶ However, a closer look at the lives the claimants actually led belied their claims of disability. Indeed, one of the main sources that helped investigators uncover the fraud were pictures posted to the claimants’ Facebook pages showing them skiing, boating and engaged in other activities that were

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¹ See, e.g., William K. Rashbaum & James C. McKinley, Jr., *Charges of 106 in Huge Fraud Over Disability*, N.Y. TIMES, Jan. 7, 2014, at A1; Pervaiz Shallwani & Damian Paletta, *Ex-NYPD Cops, Firefighters Charged With Disability Fraud*, WALL ST. J., Jan. 8, 2014, at A2; *Hearing on the Soc. Sec. Disability Ins. Fraud Scheme in N.Y.C., Before the Soc. Sec. Subcomm. of the H. Ways and Means Comm.*, 113th Cong., 2nd Sess. (2014) (statement of Patrick P. O’Carroll, Jr., Inspector Gen. Soc. Sec. Admin.), available at <http://oig.ssa.gov/newsroom/congressional-testimony/jan16>, last visited Feb. 10, 2014 (hereinafter, O’Carroll Testimony).

² Raymond Lavalley, age 83, is a former FBI agent and was a senior prosecutor with the Nassau County District Attorney’s office. Rashbaum & McKinley, *supra* note 1, at A1.

³ *Id.* See also Shallwani & Paletta, *supra* note 1, at A2; O’Carroll Testimony, *supra* note 1.

⁴ O’Carroll Testimony, *supra* note 1.

⁵ Rashbaum & McKinley, *supra* note 1, at A1; Shallwani & Paletta, *supra* note 1 at A2; O’Carroll Testimony, *supra* note 1.

⁶ Rashbaum & McKinley, *supra* note 1, at A1; Shallwani & Paletta, *supra* note 1, at A2; O’Carroll Testimony, *supra* note 1.

clearly incompatible with their claims of disability.⁷

Announcement of the fraud came at a time of already great consternation regarding the overall health of the Social Security Disability (SSD) system. Since the economic crisis of 2008, and the contraction of the United States employment market, the number of SSD claims has risen dramatically.⁸ Aside from leading to significant delays in the processing of such claims and a backlog of undecided cases, the pressures put on the “trust fund”⁹ that pays for social security disability benefits have caused experts to estimate that the trust fund may become insolvent in the next few years.¹⁰ The prognosis is significantly more bleak than the ones that apply to the more frequently discussed Social Security Retirement fund and the Medicare trust fund, which are estimated to remain solvent without any changes to current laws through 2040 and 2029 respectively.¹¹ In light of these financial pressures, the price tag of the current fraud, approximately \$21 million dollars in fraudulent benefits paid to date, with the possibility of much more to be uncovered,¹² seems particularly troubling. The fraud has also served to provide further fuel for long-simmering political pressures coming from those who contend that the SSD system is too generous and is in serious need of reform.¹³

Additionally, the nature of the above-mentioned recent frauds

⁷ Rashbaum & McKinley, *supra* note 1, at A1; Shallwani & Paletta, *supra* note 1, at A2; O’Carroll Testimony, *supra* note 1.

⁸ See Damian Paletta, *Insolvency Looms, as States Drain U.S. Disability Fund*, THE WALL STREET JOURNAL 19 (March 22, 2011) (hereinafter, Paletta, *Insolvency Looms*).

⁹ The term trust fund is placed in quotes here because the government’s SSD account is not literally a trust fund. A portion of each employee’s FICA (Federal Insurance and Contributions Act) or social security tax payments are placed in an SSD account. However, rather than the money remaining in that account until the particular employee becomes disabled, the money is used to pay benefits to persons currently receiving SSD benefits. See OFFICIAL SOCIAL SECURITY WEBSITE, *Disability Insurance Trust Fund*, <http://www.ssa.gov/oact/progdata/describedi.html> (last visited October 13, 2014). To the extent current revenues exceed current expenditures from the account, the money is invested. *Id.* However, the account has run a deficit in each of the past five years. Rachel Greszler, *Social Security Disability Trust Fund Will be Exhausted in Just Two Years: Beneficiaries Facing Nearly 20 Percent Benefit Cuts*, THE HERITAGE FOUNDATION, <http://www.heritage.org/research/reports/2014/08/social-security-disability-insurance-trust-fund-will-be-exhausted-in-just-two-years-beneficiaries-facing-nearly-20-percent-cut-in-benefits> (last visited October 13, 2014).

¹⁰ Paletta, *Insolvency Looms*, *supra* note 8.

¹¹ *Id.*

¹² Rashbaum & McKinley, *supra* note 1, at A1.

¹³ See, e.g., Jon C. Dubin & Robert E. Rains, *Scapegoating Social Security Disability Claimants (and the Judges Who Evaluate Them)*, 6 ADVANCE: THE J. OF THE ACS ISSUE GROUPS 199, 199 & nn. 1-2 (2012).

makes them particularly galling. First, the police officers and firefighters who perpetrated the fraud had previously sworn to uphold and defend the very laws that they broke. Second, the fact that they exploited fears and memories of the 9/11 attacks, as well as the suffering of so many that were genuinely scarred by those events seems particularly cynical and reprehensible. Finally, this particular fraud came on the heels of the announcement of at least a couple of other large scale scams involving SSD fraud, raising the specter of additional frauds on perhaps a scale greater than had previously been imagined.¹⁴

The day after the indictments were handed down, D. Randall Frye, an Administrative Law Judge (ALJ) with the Social Security Administration (SSA) and the head of the Association of Administrative Law Judges wrote an editorial for the *New York Times* both decrying the fraud and suggesting a number of steps that should be taken to reform the SSD system to make such frauds less likely to occur in the future.¹⁵ One particular matter that Judge Frye decried was the SSA policy, which prevents Judges, such as himself, and other SSA employees from visiting the Facebook pages and other social media accounts of disability claimants.¹⁶ Judge Frye intimated that without this policy, judges like him might have been able to detect the inconsistencies between claimants' actual lives and their disability files that investigators ultimately discovered in uncovering the fraud.¹⁷ Additionally, Judge Frye criticized the fact that while attorneys often represent claimants such as those involved in the New York fraud at their social security hearings, the SSA is not represented by counsel.¹⁸ Thus, Judge Frye suggested that providing legal representation for the government in all disability hearings would reduce fraudulent and improper awards of benefits.¹⁹

Aside from the aforementioned reasons, the announcement of the New York disability fraud scheme was particularly troubling for yet another reason. At the time the indictments were announced, I was serving as counsel to a claimant in a SSD case. I run a legal clinic at Thomas Jefferson School of Law for homeless veterans with substance abuse problems, who are participating in a nationally recognized recovery program, Veterans Village of San Diego.²⁰ Most of our clients are "dual diagnosed," meaning they

¹⁴ O'Carroll Testimony, *supra* note 1; Paletta, *supra* note 8.

¹⁵ D. Randall Frye, *Fixing Disability Courts*, N.Y. TIMES, Jan. 20, 2014, at A17.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ For a general description of the program, see Dale Margolin Cecka, Steven K. Berenson, Lisa V. Martin, Karen Pearlman Raab, & Maryann Zavez,

have at least one diagnosed mental illness in addition to their substance abuse problem.²¹ We will call the claimant in this case “Major,” a homeless veteran who served ten years in the United States Army.²² Major had only entered the recovery program a short period of time before he was scheduled to appear before an ALJ for a hearing on his claim. Indeed, I first met Major about a week before his scheduled hearing. Because I was not willing to take Major’s case on such short notice, he and I agreed that our clinic would represent him on the condition that we were able to obtain a continuance of his hearing. Fortunately, the judge on the case was willing to grant an approximate two-month continuance to allow my students and I time to prepare.²³

After the continuance was granted and I filed the SSA’s official form designating me as Appointed Representative for Major’s hearing, I was able to access the electronic file for the hearing.²⁴ Given the long history of medical treatment that Major had shared with me, the file relating to his disability application was shockingly thin. The file only contained medical records for a short period of time, approximately one year between the time of his application in September 2010 and late 2011, despite Major’s continuous treatment at the local VA hospital from late 2011 up to early 2014. While I am not an experienced disability attorney, it was clear that the medical records were not sufficient to support Major’s claim and Major’s application would almost certainly have been denied had his hearing gone forward as originally scheduled. Indeed, Major had been denied SSD benefits several times before.²⁵

Empowerment, Innovation, and Service: Law School Programs Provide Access to Justice and Instill a Commitment to Serve, 48 FAM. CT. REV. 672, 675-76 (2010); Steven K. Berenson, *Homeless Veterans and Child Support*, 45 FAM. L. Q. 173, 186 (2011).

²¹ See Definition of Dual Diagnosis, Medline Plus, available at <http://www.nlm.nih.gov/medlineplus/dualdiagnosis.html>, last visited May 27, 2014.

²² The details of Major’s case are deliberately kept vague throughout this article so as to avoid violating his confidentiality rights. However, Major did consent expressly to a general discussion of his case in this article.

²³ Note that by this time more than three years had already passed since Major filed his initial claim for benefits.

²⁴ Social Security Form SSA-1696, available at <http://www.ssa.gov/online/ssa-1696.pdf>, last visited, May 27, 2014. I participate in the SSA’s Appointed Representative Services program, which allows me online access to client claim files. See <http://www.socialsecurity.gov/ar/>, last visited May 27, 2014.

²⁵ There are actually two separate types of disability benefits available from the SSA. The first, Social Security Disability Insurance (SSDI) is authorized by Title II of the Social Security Act, 42 U.S.C. §§ 401, et seq. In brief, persons are eligible to receive SSDI if they have worked a certain number of quarters within a certain period of time. See 42 U.S.C. § 423(c)(1)(B). Taxes on their earnings

However, any person who spoke with Major, even a short time would conclude: 1) that he suffers from at least some form of mental illness; and 2) his chances of obtaining a steady job are very slim in the current U.S. economy. Even with the two-month continuance and the assistance from the legal clinic, an estimation of Major's odds for receiving SSI benefits were no greater than 50%. This seeming contradiction, between the New York claimants, who were not disabled but could, and did, obtain benefits with relative ease, and Major, who is almost certainly unemployable yet has been thwarted in his effort to obtain disability benefits time and time again, only furthered my sense of outrage over the New York fraud.

It seems to me that as a result of the publicity surrounding the New York scam and Judge Frye's reply, a number of "frauds" or falsehoods about the SSD system have been reinforced. For example, the "success" of the New York disability fraud scheme and the discussion around it suggests that it is too easy to receive

are paid into a "trust fund" much like the Social Security Retirement fund, and that fund is used to pay SSDI benefits. Also like Social Security Retirement payments, the amount of SSDI benefits a person receives correlates to the level of that person's income during the relevant period. Additionally, Supplemental Security Income (SSI) benefits are available under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381, et seq. SSI is an anti-poverty program for disabled persons. Thus, while no prior work history or payments into a fund are required, strict income and asset restrictions do apply to SSI eligibility. For a general description and comparison of the two programs, *see* Fact Sheet, Social Security and Supplemental Security Income (SSI): What's the Difference?, available at <http://www.ssa.gov/sf/FactSheets/aianssavssfinalrev.pdf>, last visited June 2, 2014; Stan Hinden, AARP Bulletin, What's the Difference Between SSDI and SSI?, available at <http://www.aarp.org/work/social-security/info-06-2012/social-security-disability-insurance-supplemental-security-income.html>, last visited June 2, 2014. It is possible for a person to receive both SSDI and SSI, if the amount of one's SSDI payment is sufficiently low that it does not put the recipient over the income eligibility standard for SSI. *See* Robert Rains, *Disability and Family Relationships: Marriage Penalties and Support Anomalies*, 22 GA. ST. U. L. REV. 561 (2006). Because Major had no compensated work history following his discharge from the military nearly 20 years ago, he was ineligible for SSDI. However, his impoverishment did leave him economically eligible for SSI. In any event, the determination of whether a person is disabled is the same for both programs. Richard P. Weishaupt & Robert E. Rains, *Sullivan v. Zebley: New Disability Standards for Indigent Children to Obtain Government Benefits*, 35 ST. LOUIS U. L.J. 539, 547-48 (1991). Thus, I will not generally distinguish between the two programs throughout the following discussion. Because SSI is funded separately from the SSD trust fund out of general government revenues, and because the amount spent on SSI benefits each year is very small in comparison to the amount spent on SSDI benefits, SSI is only tangentially relevant to the overall fiscal soundness of the SSD program. Disabled children may also be eligible to receive SSI. However, throughout this article, I will only discuss the SSD program as it applies to adults.

disability benefits. However, a closer look at the system belies this claim. Moreover, in many cases it is the neediest claimants and those least able to navigate the system that finds it most difficult to obtain benefits.

Additionally, Judge Frye and others suggest that disability determinations would be more accurate if the SSA jettisoned its non-adversarial, inquisitorial hearing system in favor of a more traditional adversary adjudication model, with the SSA represented by a lawyer, just as many claimants are. However, no actual evidence supports the claim that an adversarial system would work better than the inquisitorial system in making SSD determinations. Given the potential of tremendous transaction costs involved in changing fundamentally the world's largest administrative adjudicatory system, the burden of proof must be on those who would advocate such a change to demonstrate that the benefits would in fact outweigh the costs. Moreover, any assessment of the future benefits of a change to an adversarial system would have to consider that the costs of adjudication in such a system would almost certainly increase going forward.

Many details have yet to emerge about the New York fraud scheme, but at first blush, it appears that it focused on the "medical" aspect of disability determinations, rather than the vocational aspect. However, to the extent that the medical aspect of disability determinations is flawed, the vocational aspect is completely out of line with reality. Thus, the third fraud addressed is the myth that the vocational aspects of disability determinations reflect the reality of the contemporary U.S. economy.

This article addresses each of these three frauds about the SSD program: 1) that it is too easy to obtain disability benefits;²⁶ 2) that a fully adversarial adjudicatory system with attorney representation for SSA would improve SSD outcomes;²⁷ and 3) that SSD hearings result in *bona fide* vocational assessments.²⁸ After debunking the three frauds, the article goes on to demonstrate how the results in Major's case to date further rebut the three frauds.²⁹

Debunking the first two frauds addressed here does not lead to the conclusion that major reforms are required to the current system. After all, if it is already challenging to obtain SSD benefits, there is no need to tighten eligibility standards, as some have called for, to address the fiscal challenges the program presently faces and the political pressures that have been brought to bear upon the program. Similarly, if the critics of the current

²⁶ See *infra* Part I.

²⁷ See *infra* Part II.

²⁸ See *infra* Part III.

²⁹ See *infra* Part IV.

SSD inquisitorial adjudicatory process have failed to make the case for a change to an adversarial system, then the current system should remain in place. However, rebutting the fraud that the SSD system includes bona fide vocational assessments that accurately reflect the modern economy does call out for change to the system. Unlike others who have suggested that the vocational aspect of the SSD process is amenable to effective reforms,³⁰ both my discussion of this particular fraud, and the history of the SSA's inability to develop a system of reliable vocational assessments, leads me to conclude that the vocational aspect of the SSD system should be scrapped. Thus, only those who meet a medical standard of disability would be found disabled. Though not its primary goal, such a change would also greatly reduce the number of persons who would receive SSD benefits in the future, thus alleviating both the current fiscal and political pressures on the system. Such a change would also be consistent with social policy in effect at least since passage of the Americans with Disabilities Act, under which other than those who are completely medically disabled from working, persons with disabilities should be given the support and accommodations necessary to allow them to participate in the workforce.

Nonetheless, a change that would leave potentially thousands or even millions of persons who would have been found disabled under the existing SSD system without any public support in our current, challenging economic environment would be less than humane. Thus, elimination of the vocational aspects of the current SSD system would require its replacement with a new program that would involve job training and placement services, workplace accommodations and support and income support throughout the process to both displaced workers and those with disabilities that are not severe enough to qualify for benefits under the reformed SSD system. Thus, the article concludes by making the case for a new entitlement program along these lines.³¹

I. FRAUD # 1: IT IS TOO EASY TO GET SOCIAL SECURITY DISABILITY BENEFITS

Formally, to obtain SSD benefits, an applicant must show an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12

³⁰ See *infra* note 225 and accompanying text.

³¹ See *infra* Part V.

months."³² At least on its face, this disability standard appears to be significantly more stringent than that which applies to many other disability programs, including the disability programs of many Western European countries.³³

On the other hand, the apparent ease with which the New York disability claimants were able to secure benefits fuels the notion that it is relatively easy to obtain social security disability benefits. Some recent reports about the system also give credence to this assumption. For example, a recent *Wall Street Journal* article reported that in 2010 approximately 67% of the SSD cases that went to hearing before an ALJ resulted in approval of the claim for benefits.³⁴ However, in 2013, that rate fell to 56%.³⁵ This suggests that at least to a certain extent, the system can regulate itself in response to an increase in claims in recent years and to concerns about the solvency of the system.³⁶

Additionally, the relatively high success rate of claimants who appear before ALJs obscure the fact that ALJ hearings are the third step of an administrative process in which claimants fare less well in the earlier two phases. First, a claim for SSD benefits starts with an application filed by the claimant. These claims can be filed online, by telephone, or in person at a local Social Security office.³⁷ These initial claims are usually reviewed by a state Disability Determination Service.³⁸ Between 2002 and 2010, 74% of the disability claims filed at this level were denied.³⁹ If denied, the claimant may then request "reconsideration" of the denial.⁴⁰ In theory, a request for reconsideration requires a *de novo* review by the state agency that made the initial denial of the application.⁴¹ However, an average of only 3% of those who sought reconsideration of their denials between 2002 and 2010 were

³² 42 USC §423(d)(1)(A).

³³ Dubin & Rains, *supra* note 13, at 117; Jon C. Dubin, *The Labor Market Side of Disability-Benefits Policy and Law*, 20 S. CAL. REV. L. & SOC. JUST. 1, 51 & n. 217 (2011) (hereinafter, Dubin, *Labor Market*).

³⁴ Damian Paletta, *Government Pulls in Reins on Disability Judges*, THE WALL STREET JOURNAL, at A1 (December 26, 2013).

³⁵ *Id.*

³⁶ *See supra* notes 8-10.

³⁷ Oren R. Griffin, *Social Security Disability Law and the Obstacles Facing Claimants With Mental Disabilities*, 36 LAW & PSYCHOL. REV. 147, 153 (2012)(hereinafter, Griffin, *Obstacles*).

³⁸ *Id.*

³⁹ Social Security Administration, ANNUAL STATISTICAL REPORT ON THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM, 2012, Chart 11, p. 143 (Feb. 26, 2014), http://www.socialsecurity.gov/policy/docs/statcomps/di_asr/2012/di_asr12.pdf, (hereinafter SSA Report).

⁴⁰ Griffin, *Obstacles*, *supra* note 37, at 153.

⁴¹ *Id.*

awarded benefits at this stage of the process.⁴² If reconsideration is denied, then the claimant can seek a hearing before an administrative law judge.⁴³ The ALJ hearing is also a *de novo* review.⁴⁴ Claimants who are dissatisfied with the ALJ's decision can invoke the final intra-agency stage of the review process, an appeal to the Social Security Appeals Council.⁴⁵ Only 13% of all SSD claims filed between 2002 and 2010 were approved at either the ALJ or Appeals Council stage.⁴⁶ Judicial review of Appeals Council decisions is available, but the scope of review is narrow.⁴⁷ Only about 1% of SSD claims filed ever make it into the federal court system.⁴⁸ Overall, 41% of the claims filed for disability benefits were approved between 2002 and 2010.⁴⁹

Due to low levels of success at the early stages of the SSD process, a high degree of persistence is required on behalf of claimants to achieve ultimate success. Yet, long delays at each phase of the process can challenge even the most determined and persistent claimant. The average amount of time it takes to obtain a decision on an initial application for benefits is approximately four to six months.⁵⁰ Reconsideration requests then take another three to five months.⁵¹ It takes approximately another 14 months to get a hearing before an ALJ, where the largest proportion of disability applications are approved.⁵² This means that many successful

⁴² SSA Report, *supra* note 39, at Chart 11, p. 143. In 2006, the SSA announced plans to scrap this second stage of the review process. See Frank S. Bloch, Jeffrey S. Lubbers, & Paul R. Verkuil, *The Social Security Administration's New Disability Adjudication Rules: A Significant and Promising Reform*, 92 CORNELL L. REV. 235, 235 (2007) (hereinafter, Bloch, *et al.*, *New Rules*). However, these proposed reforms were never fully implemented. See Griffin, *Obstacles*, *supra* note 37, at 152 n. 27. At present, there are ten "prototype" states in which the reconsideration stage has been eliminated. See Jeffrey S. Wolfe & Dale Glendening, *Through the Disability Looking Glass: A Considered Response to Professor Pashler's Wild Social Security Hare*, 44 U. MEM. L. REV. 523, 581 & n. 255 (2014); Preparing for Your Social Security Disability Appeal, <http://www.nolo.com/legal-encyclopedia/preparing-your-social-security-disability-appeal.html> (last visited December 31, 2014).

⁴³ Griffin, *Obstacles*, *supra* note 37, at 153.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ SSA Report, *supra* note 39, at Chart 11, p. 143.

⁴⁷ See Frank Bloch, BLOCH ON SOCIAL SECURITY § 6:2 (2014); Bryan C. Bond, *Note: Taking it on the Chenery: Should the Principles of Chenery I Apply in Social Security Disability Cases?*, 86 NOTRE DAME L. REV. 2157, 2170 (2011).

⁴⁸ Jeannie H. Kim, *Social Security Disability Law 101*, 55 ORANGE COUNTY LAW. 26 (July 2013) (hereinafter Kim, *Disability 101*).

⁴⁹ SSA Report, *supra* note 39, at Chart 11, p. 143.

⁵⁰ Kim, *Disability 101*, *supra* note 48, at 26. Note that the wait times mentioned here can vary greatly among different Social Security regional offices.

⁵¹ *Id.*

⁵² *Id.*

claimants will have to wait approximately two years to receive their benefits. Appeals to the Appeals Council can add another 16 months on average to the process.⁵³ If successful, claimants may obtain paid benefits retroactive near to the original filing date of the initial application.⁵⁴ However, even retroactive benefits may not be enough to make many claimants whole. After all, by definition, successful claimants are deemed unable to support themselves through employment.⁵⁵ With a paucity of other public resources available for support,⁵⁶ many low-income applicants may simply not have sufficient resources to survive the two plus year process in order to receive funds.⁵⁷

At first glance, it may seem appropriate that the highest rate of success is at the third stage of the administrative process – the ALJ hearing. After all, it must be the case that a large number of completely unmeritorious requests are filed, and it is easy to weed these applications out at the earliest stages of the process. But those with the most meritorious claims are likely to persist, even if it takes the claimant years and many levels of appeal before they see their benefits.

The problem is that no empirical evidence supports this hypothesis. We do not know which applicants do and do not persist with their disability claims. In fact, there is reason to believe that the applicants in most need are the least likely to persist through the lengthy, tedious and multi-layered process of appealing an initial denial.⁵⁸ Those applicants who are poor, homeless or have serious mental health issues are less likely to have resources to “stay the course” and see the process through to a successful conclusion.

In any event, it is almost certain that at each level of the appeals process, and particularly at the early stages, many people

⁵³ *Id.*

⁵⁴ SSI benefits may be paid retroactive to the first day of the month following the month in which the application for benefits was filed, provided the disability standard was met as of that date. SSDI benefits may be paid up to 12 months prior to the filing of an application, though there is a five month waiting period after the onset of disability before payments can begin. *See generally, If I Am Determined Disabled, How Far Back Will Social Security Pay Benefits?*, SOCIAL SECURITY DISABILITY & SSI RESOURCE CENTER, <http://www.ssdrc.com/disabilityquestions2-84.html> (last visited December 31, 2014).

⁵⁵ *See* 42 U.S.C. § 423(d)(2)(A) (2004); Griffin, *Obstacles*, *supra* note 37, at 154-56.

⁵⁶ *See infra* notes 194-96.

⁵⁷ Griffin, *Obstacles*, *supra* note 37, at 186.

⁵⁸ Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 WM. & MARY L. REV. 1933, 1997 n. 340 (2011).

with meritorious claims merely give up, out of frustration, despairing of their ultimate prospects for success on the claim or simply lack the legal assistance and other resources necessary to continue. Indeed, meritorious applicants withdrawing their claims from the process would save the federal government money in the long run, although it defeats the service objectives behind the disability program. Similar processes of denial apply in a broad range of government benefit programs. Nearly three decades ago, Massachusetts Institute of Technology (MIT) scholar Michael Lipsky described this process as “bureaucratic disentanglement.”⁵⁹ Rather than restricting access to government benefit programs at the level of statutory or regulatory eligibility standards, access is restricted at the lowest level of bureaucratic application of eligibility rules, through procedural hurdles rather than substantive eligibility requirements. While this process operates in a variety of public benefit programs,⁶⁰ a more honest approach to rationing scarce government resources would be to tighten eligibility standards, rather than driving otherwise eligible claimants away through delay, frustration and obfuscation.

In Major’s case, despite substantial mental and physical health issues, he was able to appeal from both the SSA’s initial denial of his claim and its denial of his request for reconsideration. However, as was supposed above with regard to at least some of the neediest SSD applicants, Major’s limited income resulted in his being homeless and living on the streets for most of the 42 months between his initial application for benefits and his ALJ hearing.⁶¹

⁵⁹ Michael Lipsky, *Bureaucratic Disentanglement in Social Welfare Programs*, 58 SOC. SERV. REV. 3 (1984).

⁶⁰ Littwin, *supra* note 58, at 1950, 1989.

⁶¹ Major was not entirely without income throughout the relevant period. Major received a small amount of money from the Department of Veterans Affairs (VA) for service connected disability benefits for the physical injuries resulting from a helicopter accident he was involved in while in the military. However, until shortly before his SSD ALJ hearing, the VA had not “connected” Major’s mental health issues to his term of military service. Thus, he did not receive VA disability payments for those ailments. The VA determined that Major’s physical injuries impaired his earning capacity by 30%, thus resulting in monthly payments of a few hundred dollars during the relevant period. Though any retroactive SSI benefits Major would be entitled to would be offset by the VA benefits he had received during the relevant period (after the first \$20), Major would still be entitled to SSI payments of a few hundred dollars per month, given the monthly SSI payment amount during the relevant period. See *Understanding Supplemental Security Income – 2014 Version*, OFFICIAL SOCIAL SECURITY WEBSITE, <http://www.socialsecurity.gov/ssi/text-income-ussi.htm> (last visited June 2, 2014). As will be discussed in greater detail shortly before his SSD ALJ hearing, the VA did “service connect” Major’s depression, thus upping his disability rating to 80%, and his monthly compensation to around \$1,500. Because this amount is greater than the SSI eligibility standard, the

Despite frequent suggestions to the contrary, it is important to note that a finding of disability does not automatically entitle the claimant to a lifetime stream of benefits. If the claimant's condition improves, either on its own, through treatment, or perhaps through advances in medicine or other available therapies, the claimant is subject to having their benefits terminated with a finding that he or she is no longer disabled.⁶² It may be the case that for an individual claimant, the ALJ will order a review of the claimant's condition after a certain period of time following the hearing. Additionally, the SSA has a program to conduct Continuing Disability Reviews (CDRs) of SSD recipients to assess their continuing eligibility to receive benefits.⁶³ The amount of resources the SSA has devoted to CDRs has varied a great deal over the three decades the CDR program has been in place.⁶⁴ However, critics of the SSD program focus particularly on the promise of expanded CDRs to combat the growth in expenditures under the program.⁶⁵

In any event, the foregoing discussion makes clear that obtaining and maintaining SSD benefits is far from a cakewalk. Indeed, the overwhelming majority of SSD applicants are unsuccessful, and even many with meritorious claims are not able to sustain the often long and tortuous effort required to obtain benefits.

II. FRAUD # 2: AN ADVERSARY SOCIAL SECURITY HEARING PROCESS WOULD BE PREFERABLE

Judge Frye's primary critique of the system, one that has been

prospective aspect of Major's SSI claim was rendered moot by his new VA rating. However, several thousand dollars worth of claimed retroactive benefits remained in issue at Major's ALJ hearing. For a more detailed description of the VA's disability compensation system, see Steven K. Berenson, *Legal Services for Struggling Veterans – Then and Now*, 31 HAMLINE J. PUB. L. & POL'Y 101, 117-19 (2009).

⁶² See William R. Morton, *Social Security Disability Insurance (SSDI) Reform: An Overview of Proposals to Reduce the Growth in SSDI Rolls*, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS 5 (2013), <http://fas.org/sgp/crs/misc/R43054.pdf> (last visited July 30, 2014); Drew A. Swank, *Money for Nothing: Five Small Steps to Begin the Long Journey to Restoring Integrity to the Social Security Administration's Disability Programs*, 41 HOFSTRA L. REV. 155, 166 (2012) (hereinafter, Swank, *Five Small Steps*).

⁶³ Morton, *supra* note 62, at 6-7; Swank, *Five Small Steps*, *supra* note 62, at 166.

⁶⁴ Morton, *supra* note 62, at 6-7; Swank, *Five Small Steps*, *supra* note 62, at 166.

⁶⁵ Swank, *Five Small Steps*, *supra* note 62, at 166; Wolfe & Glendening, *supra* note 42, at 587.

made by other commentators,⁶⁶ is that the SSD system would be improved if its current “inquisitorial” approach were replaced with an “adversarial” approach more consistent with that used in American courts.⁶⁷ The fundamental differences between inquisitorial and adversary systems lie in the roles of the legal advocates and the judges. In adversary systems, at least as ideally constituted, each party to the dispute is represented by a skilled advocate, whose role is to present the evidence most advantageous to the party represented by the advocate, and to challenge the evidence presented by the other side.⁶⁸ The advocate’s duties run primarily to the represented party and the advocate has no duty to assist the opposing party, and in fact may be prohibited from introducing evidence that may undermine their client’s position in the dispute.⁶⁹ Because the evidence of each side’s evidence is presented effectively through this format, the role of the judge is passive in the in adversary systems. The judge has no authority to seek out evidence, or to conduct an independent investigation separate from the presentations made by each party’s advocate. The judge simply renders an impartial decision based on the presented evidence.

⁶⁶ See, e.g., David Autor & Mark Duggan, *The Growth in the Social Security Disability Rolls: A Fiscal Crisis Unfolding*, 20 J. ECON. PERSP. 71, 93 (2006); Wolfe & Glendening, *supra* note 42, at 584.

⁶⁷ See *supra* note 15 and accompanying text. These suggestions are also not new. In the early 1980s, the Social Security Administration Representation Project (SSARP) was launched in five regional SSA offices. See Frank S. Bloch, Jeffrey S. Lubbers, & Paul R. Verkuil, *Developing a Full And Fair Evidentiary Record in a Non-Adversary Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 CARDOZO L. REV. 1, 42 (2003) (hereinafter Bloch, *et al.*, *Full and Fair*). However, the Project was enjoined by a Federal District Court on grounds that it unconstitutionally deprived claimants of their procedural due process rights, and violated both the Social Security Act and its implementing regulations. *Salling v. Bowen*, 641 F. Supp. 1046 (W.D. Va. 1986). Among its findings, the Court determined that attorney representation for the SSA in the demonstration cities increased the amount of time it took to decide cases, increased reversal rates of ALJ decisions, failed to achieve uniformity of decisions among ALJs, failed to achieve full and fair development of case files, and failed to improve hearing quality more generally. *Id.* at 1061-64. For a discussion and mild critique of this decision, see Bloch, *et al.*, *Full and Fair*, *supra* at 50-52. Thank you to Jon Dubin for bringing this decision to my attention.

⁶⁸ See generally, David Luban, *LEGAL ETHICS AND HUMAN DIGNITY* 27 (2007); Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 FLA. L. REV. 1, 17-20 (2004) (hereinafter, Camp, *Inquisitorial Process*); Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 COLUM. L. REV. 1289, 1300 (1997) (hereinafter, Dubin, *Issue Exhaustion*).

⁶⁹ Luban, *supra* note 68, at 27.

By contrast, in an inquisitorial system, the judge, rather than the parties' representative is the primary authority for development of the record.⁷⁰ Thus, the judge plays a much more active role in framing the legal issues, participating in the discovery and presentation of evidence and in the overall conduct of the proceedings.⁷¹ As a result of the enhanced judicial role, the roles of the parties' advocates are correspondingly decreased. The parties' advocates serve to aid the judge's inquiry into the matter, rather than to direct the course of the proceedings.

As stated above, most American judicial systems follow an adversarial model. By contrast, the inquisitorial model dominates in Europe and many Latin American judicial systems.⁷² Indeed, many common features of adversarial models are enshrined in the U.S. Constitution. Although such features primarily relate to criminal proceedings such as the right to counsel, the rights to call and cross-examine witnesses, the right to a jury trial, the right not to testify against oneself and the right to confront one's accusers.⁷³

The debate on the relative merits of inquisitorial versus adversarial systems has been longstanding, and has not resulted in a clear winner.⁷⁴ Legal Ethics scholar David Luban has persuasively argued that since a clear case has not been made on the merits for either system, the transaction costs that would be incurred in switching from one system to the other cannot be justified regardless of which system is in place.⁷⁵

The question of adjudication costs is particularly pressing in the context of SSD hearings, which have been described as the largest administrative adjudicatory system in the world.⁷⁶ Certainly, adversary hearings, with both sides represented by counsel, would take longer and add to the cost of the SSA's adjudicatory system.⁷⁷ Consolidation of the record development, fact-finding, issue spotting and decision making roles in the SSD ALJ results in efficiencies which, if sacrificed across the huge number of SSD cases decided each year, could result in massive cost increases to a system that is already in financial crisis.⁷⁸

⁷⁰ Camp, *Inquisitorial Process*, *supra* note 68, at 18; Dubin, *Issue Exhaustion*, *supra* note 68, at 1300.

⁷¹ Dubin, *Issue Exhaustion*, *supra* note 68, at 1303; Vicki Lens, *Revisiting the Promise of Kelly v. Goldberg in the Era of Welfare Reform*, 21 GEO. J. ON POVERTY L. & POL'Y 43, 84 (2013).

⁷² Dubin, *Issue Exhaustion*, *supra* note 68, at 1300.

⁷³ These rights are generally not recognized in inquisitorial systems.

⁷⁴ See Luban, *supra* note 68, at 19-64.

⁷⁵ Luban, *supra* note 68, at 56.

⁷⁶ Dubin, *Issue Exhaustion*, *supra* note 68, at 1291 (citations omitted).

⁷⁷ Dubin, *Issue Exhaustion*, *supra* note 68, at 1318. See also Morton, *supra* note 62, at 26.

⁷⁸ Dubin, *Issue Exhaustion*, *supra* note 68, at 1320.

The inquisitorial approach in SSD hearings seems to be justified on philosophical grounds as well. As Luban⁷⁹ and other scholars have pointed out,⁸⁰ the argument for the adversarial system is strongest as it relates to criminal law. Perhaps the greatest strength of the adversarial system is the ability to effectively safeguard the rights of the accused.⁸¹ Indeed, we tolerate significant restrictions on prosecutors' ability to secure convictions in the name of protecting defendants' rights. Yet this seems appropriate to us in a liberal democracy such as the United States, where government overreach is viewed as a greater threat than failure to punish guilty criminals.⁸² Better one hundred guilty go free than one innocent is convicted.⁸³

By contrast, the adversary system is not as justified in civil cases between private parties, where government overreach is not a concern.⁸⁴ In this regard, it may seem that administrative cases are more analogous to criminal cases than civil cases because the proceeding is between a citizen and the state. Indeed, for some administrative proceedings, such as deportation cases, where the potential for government overreach is great, the analogy to criminal cases may be strong.⁸⁵ However, the analogy does not hold for SSD and other public benefit cases. Rather than the state seeking to impose unwanted action upon a citizen who did not seek the assistance of the state, SSD cases involve citizens affirmatively seeking the assistance of the government.⁸⁶ In such cases, it may well be that an inquisitorial approach is preferable, as it better allows the government adjudicator the opportunity to protect the public interest in safeguarding limited government resources, while at the same time serving the social safety net objectives of the

⁷⁹ Luban, *supra* note 68, at 28-29.

⁸⁰ See, e.g. Deborah Rhode, *Ethical Perspectives on Law Practice*, 37 STANFORD L. REV. 589, 605 (1985); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1, 12 (1975).

⁸¹ Luban, *supra* note 68, at 29.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Luban, *supra* note 68, at 30.

⁸⁵ Luban, *supra* note 68, at 31.

⁸⁶ Though this argument applies strongly to SSI cases there is a wrinkle in SSDI cases, where the applicant at least in part seeks to recoup their own contributions to the system. In other words, whereas the SSI applicant seeks government assistance entirely, the SSDI applicant can claim an entitlement to resources based upon their prior contributions. However, the Social Security system, which includes both its retirement and its disability components, has always combined aspects of social insurance and public assistance, and a successful SSD or Social Security retirement claimant will often receive much more in benefits than they contributed to the trust fund. Thus, the inquisitorial system is warranted in this situation too.

program.⁸⁷

Decades ago, the U.S. Supreme Court upheld the constitutionality of the SSA's inquisitorial system against a due process challenge.⁸⁸ In that case the SSA itself argued that a move to an adversarial process would not necessarily benefit claimants.⁸⁹

A shift to an adversarial system would be incompatible with Judge Frye's other recommendation of giving ALJs the authority to view claimants' Facebook and other social media presentations to search for evidence incompatible with their claim of being "disabled." While such independent inquiry by a judge, at least theoretically, aligns with a judge's role under the current inquisitorial model, it would be completely inconsistent with the passive role of the judge embodied in the adversarial approach advocated by Judge Frye.

The two major inquisitorial adjudicatory systems in the United States are the SSD system and the disability compensation program utilized by the Department of Veterans Affairs to pay benefits to disabled veterans.⁹⁰ However, not all administrative benefits systems in the U.S. operate through an inquisitorial system. In fact, following the United States Supreme Court's landmark decision in *Goldberg v. Kelly*,⁹¹ most "public welfare" benefit systems in the United States operate through an adversarial model.⁹² However, following a recent empirical study of the effectiveness of administrative hearings, at least one scholar has called for public welfare hearings to move toward the inquisitorial model used by SSA, rather than the opposite movement suggested by Judge Frye and others.⁹³ Other scholars have also touted the benefits of inquisitorial systems for large administrative bureaucracies.⁹⁴

One of Judge Frye's major reasons to move to adversarial proceedings in SSI cases is that most claimants are represented by counsel in ALJ hearings, which he argues throws off the balance

⁸⁷ Accord Bloch, *et al.*, *Full and Fair*, *supra* note 67, at 56-57.

⁸⁸ Richardson v. Perales, 402 U.S. 389 (1971).

⁸⁹ Dubin, *Issue Exhaustion*, *supra* note 68, at 1305 & n.80 (citing to the SSA's Supreme Court brief).

⁹⁰ For a very brief description of the VA's "non-adversarial" disability determination process, see Berenson, *Legal Services*, *supra* note 61, at 118-24.

⁹¹ 397 U.S. 254 (1970). In *Goldberg*, the Court held that Constitutional Due Process requirements had to be observed before a state may terminate an individual's welfare benefits. *Id.*

⁹² Lens, *supra* note 71, at 43.

⁹³ *Id.* at 83.

⁹⁴ See Bryan T. Camp, *The Failure of Adversary Process in the Administrative State*, 84 IND. L.J. 57 (2009) (advocating an inquisitorial system for IRS Collection Due Process proceedings); Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

presumed in inquisitorial proceedings. However, further inquiry must be conducted into both the contentions that claimants are effectively represented by lawyers in SSD hearings and that the government is not.

First, it is simply incorrect to suggest that the government's interests are inadequately represented in SSD proceedings. As previously discussed, given that the vast majority of claims are rejected at the first two stages of the claim process, one can certainly not say that the government's interests in protecting the public first are inadequately represented at those stages of the process. Further at the ALJ stage, though separate counsel does not represent the government, the ALJ is expressly charged with protecting the government's interests.⁹⁵ Representing the government's interests is not the only obligation the ALJ has in administrative hearings. Thus, the ALJ has responsibilities to develop the case record fully, to assist claimants to present their case to the extent necessary and to issue a fair and well-reasoned decision on the merits.⁹⁶ However, in cases where the claimant is represented by counsel, the ALJ's need to assist the claimant is much less pronounced, and the ALJ's role lends itself to serving as a representative of the Administration more than would be the case if the claimant were unrepresented.

Additionally, at this stage, unlike a typical judge, SSD ALJs are employees of one of the parties to the proceeding. While steps have been taken to insure the independence of SSD ALJs,⁹⁷ these steps are imperfect, and there are instances of pressure bearing on ALJs by the agency to address issues in certain ways that are well documented.⁹⁸ It is no stretch to observe that SSD ALJs are smart enough to know who "butters their bread."⁹⁹

Decades ago in a now-canonical article, Professor Marc Galanter addressed the question of why certain parties seemed to

⁹⁵ Dubin, *Issue Exhaustion*, *supra* note 68, at 1303.

⁹⁶ These three distinct responsibilities have led to descriptions of Social Security ALJ's "wearing three hats," or descriptions of SSD hearings as "the three hat system." See Bloch, *Full and Fair*, *supra* note 67, at nn. 228 & 238; Bernard Schwartz, *Adjudication and the Administrative Procedure Act*, 32 TULSA L.J. 203, 208-09 (1996).

⁹⁷ Jacob Bender, Note & Comments, *Torn Between Two Masters: Flaws In The Social Security Disability Process*, 45 U. TOL. L. REV. 619, 630 (2014).

⁹⁸ Wolfe & Glendening, *supra* note 42, at 591.

⁹⁹ See, e.g., Karen S. Lewis, Comment, *Administrative Law Judges and the Code of Judicial Conduct: A Need for a Regulated Ethics*, 94 DICK. L. REV. 929, 957 (1990) (arguing that the primary threat to an ALJ's impartiality is their status as an employee of the agency, where they are subject to pressures to conform to agency standards and practices).

be much more successful than others in litigation.¹⁰⁰ In doing so, Galanter drew a distinction between “repeat players,” and “one-shotters.”¹⁰¹ Repeat players are those who litigate frequently in a given forum, whereas one-shotters litigate infrequently in the forum.¹⁰² As a result, repeat players develop experience and expertise in the forum that can overmatch one-shotters when they appear on opposite sides of a dispute. Additionally, repeat players tend to be large institutional entities, possessed of great resources, whereas one-shotters tend to be individuals with limited resources.¹⁰³ Given both the frequency of their appearances in the forum, and their available resources, repeat players have an interest in investing and developing their advantages over one-shotters in the forum.¹⁰⁴ Furthermore, over the course of their repeated appearances in the forum, repeat players can influence the “rules of the game,” to their advantage, through developing legal precedents and challenging and appealing certain disadvantageous decisions.¹⁰⁵ Of course, this further exacerbates the advantages the repeat players hold over the one-timers in the forum. As a result, the “haves come out ahead,” as the title to Galanter’s article suggests.

Galanter’s views have been affirmed in numerous contexts over the past four decades.¹⁰⁶ Of course, with regard to SSD hearings, the SSA is a classic repeat player, while the claimants who appear before it are classic one-shotters.¹⁰⁷ In this regard, it is not significant that the SSA is not separately represented by an attorney in SSD hearings. Indeed, in a number of contexts, repeat players are able to exploit the numerous advantages they hold over one-timers without the benefit of attorney representation. For example, landlords are generally not represented by attorneys in housing court, but the dramatic advantages that landlords hold over

¹⁰⁰ Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC. REV. 95 (1974).

¹⁰¹ *Id.* at 97.

¹⁰² *Id.*

¹⁰³ *Id.* at 98.

¹⁰⁴ *Id.* at 98-99.

¹⁰⁵ *Id.* at 100.

¹⁰⁶ See, e.g., IN LITIGATION: DO THE HAVES STILL COME OUT AHEAD? (Herbert Kritzer & Susan Silbey eds. 2004); Lauren B. Edelman & Mark C. Suchman, When the “Haves” Hold Court: Speculations on the Organizational Internalization of Law, 33 Law & Soc’y Rev. 941 (1999); Shaubin Taulesh, *How the “Haves” Come Out Ahead in the Twenty-First Century*, 62 DEPAUL L. REV. 519 (2013).

¹⁰⁷ See Erfat Massrey Cogan, Note, *Executive Nonacquiescence: Problems of Statutory Interpretation and Executive Power*, 60 S. CAL. L. REV. 1143, 1167 (1987). See also Paris Baldacci, *A Full and Fair Hearing: The Role of the ALJ in Assisting the Pro Se Litigant*, 27 J. NAT’L ASS’N ADMIN. L. JUDICIARY 447, 482 (2007); Lens, *supra* note 71, at 77.

tenants in this forum are well known.¹⁰⁸ The lower level bureaucrats who represent the SSA at the lower stages of the SSD claims process and ALJs at administrative hearings are more than sufficient to cement the huge institutional advantages the SSA holds over claimants in the SSD application process.

Perhaps providing experienced legal representatives on behalf of claimants would help to narrow the gap between the repeat player SSA and its one-shotter claimants. Yet Galanter contended that for a variety of reasons, legal representation would only go so far in narrowing the gap.¹⁰⁹ He also suggested that adding lawyers for the repeat player (the SSA in our case) as Judge Frye recommends would produce greater benefits for the repeat player than similarly providing counsel for the one-shotter will.¹¹⁰ Thus, Judge Frye's proposal would further exacerbate the advantages already enjoyed by the administration in ALJ hearings.

A closer look at the manner in which representation is provided in SSD cases further undermines Judge Frye's contention that claimants' counsel overmatches the agency. First, fewer claimants are represented by counsel at the first two stages of the SSD application process than at the ALJ stage. Thus, for reasons discussed above, many claimants will drop out of the process before they even have an opportunity to consult with an attorney. Second, about 20% of SSD claimants still go unrepresented at the hearing stage.¹¹¹ For reasons posited by Galanter and his progeny, such self-represented claimants are the most heavily out-gunned at the hearing stage. Also, for reasons described in greater detail below, the most vulnerable claimants with the most challenging claims are most likely to appear without counsel at their ALJ hearings. This makes the task facing such claimants all the more difficult.

A great disparity exists in the quality of representation available to claimants for ALJ hearings, even for those who are able to obtain representation, at this stage of the process. First, SSD hearings are one of the few adjudicatory forums in which claimants' representatives do not need to be licensed attorneys.¹¹² In fact, non-lawyers represent a large percentage of represented

¹⁰⁸ See, e.g., Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992).

¹⁰⁹ Galanter, *supra* note 100, at 114.

¹¹⁰ *Id.*

¹¹¹ Wolfe & Glendening, *supra* note 42, at 542.

¹¹² See Drew A. Swank, *Non-Attorney Social Security Disability Representatives and the Unauthorized Practice of Law*, 36 S. ILL. U. L.J. 223 (2012)(hereinafter Swank, *Non-Attorney*).

parties in SSD hearings.¹¹³ A lay advocate is not necessarily ineffective when representing a claimant in an adjudicatory proceeding. To the contrary, many commentators have suggested that non-lawyer representation may be a critical component to narrowing the “justice gap” in America – the gap between low and moderate income Americans’ needs for legal assistance and their ability to obtain such assistance in the current market for legal services.¹¹⁴ Nonetheless, it is undeniable that attorneys receive training, consisting of a minimum of three years of law school education and are tested for basic competency by a state sponsored bar examination, in a way that provides at least some quality assurance that does not apply to lay advocates. Further, in the case of SSD hearings, there are no formal educational or training requirements that apply to lay advocates.¹¹⁵ Thus, to the extent Judge Frye’s recommended reforms will result in highly trained and experienced SSA lawyers facing off against untrained and unexamined lay advocates, one can hardly expect the sort of “fair fight” that Judge Frye implies will result.

With regard to the “justice gap,” some might be surprised to know that most SSD claimants are represented at all of their hearings. After all, because they are unemployed at the time they apply for benefits, and often have been unemployed for years by the time of their ALJ hearing, SSD claimants are unlikely able to afford a retainer fee to hire an attorney to represent them. However, understanding how representatives’ fees are paid out following SSD ALJ hearings is critical to understanding why most claimants are represented at AJL hearings. Similar examples of representation include parties in most tort cases, as opposed to the vast majority of parties who go unrepresented regarding most of the other types of legal cases that involve low-income litigants.¹¹⁶

As previously referenced, if an applicant is successful at the

¹¹³ Former SSD ALJ Drew Swank put that figure at between 11 and 14 percent, drawing on data from 2006 and 2007. *Id.* at 234-35 nn. 88-89. There is reason to believe that this number has increased in subsequent years. *See infra*, nn. 123-27 and accompanying text.

¹¹⁴ *See, e.g.*, DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 135 (2000); Tom Lininger, *Deregulating Public Interest Law*, 88 TUL. L. REV. 727, 750, (2014); Daniel C.W. Lang, Note, *Utilizing Nonlawyer Advocates to Bridge the Justice Gap in America*, 17 WIDENER L. REV. 289 (2011).

¹¹⁵ Swank, *Non-Attorney*, *supra* note 112, at 239. Non-attorney advocates who wish to be paid a fee directly from the claimant’s recovery from the SSA do have to pass a test and meet other education and training requirements in order to be eligible for direct payment. *Id.*

¹¹⁶ *See generally*, Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal In Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 107-12 (2001).

ALJ hearing stage, they could receive benefits retroactive to, near to, or even before the original date of their application.¹¹⁷ Given the delays in the SSD process, this may result in a payment of three or four years' worth of retroactive benefits. For example, as mentioned above, Major waited 42 months between his original application date and his ALJ hearing. Even for an SSI claim, where the monthly payment amount is around \$700, a 41 month retroactive payment will result in approximately a \$30,000 award to the claimant.¹¹⁸ This, of course, is enough of a recovery from which to generate a contingent fee significant enough to encourage a representative to take on the case on such a basis.¹¹⁹

However, before concluding that SSD cases present windfall opportunities to lawyers, as is often argued regarding contingent fees in tort cases, a closer look at how contingent fees in SSD cases work is required. First, contingent fees in SSD cases are generally capped at 25% of the amount of the retroactive benefit award.¹²⁰

¹¹⁷ See *supra* note 54.

¹¹⁸ As mentioned above, see *supra* note 61, any retroactive award to Major would have been reduced by the approximately \$24,000 in VA benefits that Major received during that period. Thus, Major's retroactive award would have been closer to \$6,000.

¹¹⁹ It appears that some of the claimants' representatives in the NYC scam also got paid a percentage or a flat fee out of claimants' prospective benefits in addition to getting their share of the back benefits. *O'Carroll Testimony, supra* note 1, at 4. This was another impermissible aspect of the scam.

¹²⁰ Damian Paletta & Dionne Searcey, *Two Lawyers Strike Gold in the U.S. Disability System*, THE WALL ST. J. (Dec. 22, 2011), at 3 (hereinafter, Paletta & Searcey, *Two Lawyers Strike Gold*); Swank, *Non-Attorney, supra* note 112, at 243 & n.125; Wolfe & Glendening, *supra* note 42, at 578. There are actually two mutually exclusive ways in which a representative may be paid a fee in an SSD case. These are the fee agreement process and the fee petition process. See SSA's Fee Authorization Process, Social Security Website, available at <http://www.ssa.gov/representation/overview.htm#a0=0&sb=1>, last visited January 5, 2015. Under the fee agreement process, the claimant and representative file a written fee agreement with the SSA prior to a decision favorable to the claimant. In such circumstances, the representative's fee is limited to 25% of the retroactive benefit award, or \$6,000, whichever is lower. See Fee Agreements, Social Security Website, available at http://www.ssa.gov/representation/fee_agreements.htm#a0=0, last visited January 5, 2015; *When Can a Social Security Lawyer Take More than \$6000 of Your Backpay?*, available at <http://www.nolo.com/legal-encyclopedia/when-can-social-security-disability-lawyer-take-more-than-6000-your-backpay.html>, last visited January 5, 2015 (hereinafter, *Backpay*). The vast majority of SSD cases that involve a payment of benefits at the ALJ stage involve fee agreements. Where no fee agreement is in effect, a representative may be paid pursuant to a fee petition. See The Fee Petition Process, Social Security website, available at http://www.ssa.gov/representation/fee_petitions.htm#a0=0, last visited January 5, 2015 (hereinafter Fee Petitions). Fee petitions are most common in two situations: 1) where the claimant fired a previous attorney with whom the claimant had a fee agreement and the new attorney wishes to be paid (the fee

That is in contrast to the typical 1/3 or 40% contingency fees that are charged in tort cases that do not settle prior to a hearing. Further, there is a cap on the total amount that can be deducted from a retroactive award at \$6,000.¹²¹ Thus, even in the typical SSI case discussed above, where a 25% contingent fee of a back pay amount of \$30,000 would amount to \$7,500, the lawyer's recovery will be capped at \$6,000. In the typical SSDI case, where the back pay amount may be significantly higher,¹²² the lawyer's fee will nonetheless be capped at \$6,000.

Reflecting on these numbers, it becomes clear that SSD representation will only be cost effective for lawyers if they: 1) spend a relatively small amount of time on any given case; 2) handle a high volume of cases; and 3) "cherry-pick" cases with a high probability of success, and avoid cases with a low probability of success (which are unlikely to pay any fee at all). As to the latter point, it becomes clear why Major went without legal representation for so long across his multiple and most recent SSI claims. Claimants with obvious, usually physical injuries are much more likely to provide, at least from the lawyer's perspective – a large fee, with relatively little effort involved. By contrast, obscure ailments, such as the mental health issues that plague Major, are harder to prove, require more effort on the part of lawyers and therefore are less cost effective to pursue. Thus, as suggested earlier, it is truly the most vulnerable claimants who are the most likely to need the assistance, and who are most likely to go unrepresented at their ALJ hearings.

Given the above-described economics of representation in SSD cases, it should not be surprising that it appears that non-attorney representation is increasing relative to attorney representation. The largest providers of representation in SSD cases are large, national firms that rely heavily on non-attorney advocates to represent their clients. The largest of these firms is Binder and Binder. The Binder firm is well known throughout the country as a result of its heavy

must be apportioned between the two attorneys); and 2) where the case proceeds beyond the ALJ stage, to the Appeals Council or even to Federal Court. *See Backpay, supra*. In fee petition cases, the SSA determines a fee based on the fair value of the services provided by the representative. *Id. See also Fee Petitions, supra*. Because of the greater amount of work involved in cases that go beyond the ALJ level, fee awards in fee petition cases may exceed the \$6,000 amount. *See Backpay, supra*. However, because, as pointed out earlier, the number of claimants plummets at each successive level of review, relatively few cases involve fees of these higher amounts.

¹²¹ Paletta & Searcey, *Two Lawyers Strike it Rich, supra* note 120, at 3. Swank, *Non-Attorney, supra* note 112, at 243 & n.125.

¹²² The Wall Street Journal reported that the average SSDI monthly benefit amount was a little more than \$1,000 in 2009. *See Paletta, Insolvency Looms, supra* note 8, at 2.

investment in television advertising.¹²³ In 2010, Binder and Binder collected \$88 million in representative fees from the SSA.¹²⁴ Given the \$6,000 cap in most cases, that adds up to a lot of clients. Evidence from a lawsuit with a competitor indicated that Binder and Binder represented about 200,000 claimants between 2001 and 2010.¹²⁵ Reliance on non-lawyer advocates is a large part of Binder's business model since, such non-attorneys cost less to employ than attorneys.¹²⁶ Similarly, other large national firms such as Disability Group, Inc., rely on non-attorney representation as a core component of their business models.¹²⁷

Certainly, there are advantages to being represented by a large, national organization like Binder and Binder or Disability Group. Given the number of cases handled by the firms, it is certain that such organizations have developed expertise relating to SSD law, as well as economies of scale for handling such cases efficiently and effectively. Indeed, both firms offer the testimonials of many satisfied clients who were able to obtain SSD benefits with the assistance of these firms, often after years of failing to obtain such benefits on their own.¹²⁸

On the other hand, the above-described economics of SSD practice place tremendous constraints on the amount of time that any advocate can spend on most individual SSD cases. Thus, it is not uncommon for an advocate to meet their SSD client for the first time on the day of their ALJ hearing.¹²⁹ Sometimes, advocates even have to ask SSA personnel to introduce them to their own clients immediately prior to the hearing.¹³⁰ Such advocates often know very little about the specifics of their clients' cases. They often question their clients and other witnesses before the ALJ using a standard list of questions provided by their employer and deliver the same boilerplate closing argument in every case.¹³¹ This is certainly a far cry from the prevailing lore of the ideal attorney-client relationship, with lawyers getting to know their clients and their clients' cases on a deeper level and on an individual basis, so that the lawyer can provide expert counseling and advocacy that is

¹²³ Paletta & Searcey, *Two Lawyers Strike Gold*, *supra* note 120, at 1.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See BINDER & BINDER, <http://www.binderandbinder.com> (last visited Jan. 6, 2015); *Testimonials*, DISABILITY GROUP, INC., <http://www.disabilitygroup.com/testimonials.asp> (last visited Jan. 6, 2015).

¹²⁹ Swank, *Non-Attorney*, *supra* note 112, at 223.

¹³⁰ *Id.*

¹³¹ *Id.*

tailored to the particular circumstances of the client and the case.¹³² Thus, the picture that Judge Frye presents in touting a move to an adversary system of two experienced and well versed attorneys fighting it out in classic adversary hearing mode is not founded in reality.

There is no doubt that there are many individual lawyer and non-lawyer advocates who do an outstanding job on behalf of their SSD clients and who put forth the necessary time and effort to provide such fruitful representation. Indeed, SSD practice has historically been a core component of many legal aid and legal services practices, and lawyer and non-lawyer advocates who work in these offices usually do not take fees from their clients for such representation; therefore, they are largely immune to the economic forces described above. But legal aid and legal services offices and law school clinics represent a relatively small share of the overall pool of SSD applicants. As discussed, it was mere chance that Major ended up in a recovery program affiliated with a law school clinic. But for that serendipity, Major likely would have headed into his ALJ hearing without representation, as he had previously when his applications for benefits were denied.

Given the inquisitorial nature of SSD hearings, authority suggests that attorneys for claimants have a duty to provide all relevant information to the ALJ, even if it would be damaging to their client.¹³³ As noted, this is inconsistent with a lawyer's typical partisan duties in an adversary system. A move to a full adversary system along the lines that Judge Frye advocates would likely obviate this duty, and might actually reduce the amount of relevant evidence ALJs have on which to base their decisions.

For the foregoing reasons, Judge Frye and others have failed to make the affirmative case for a change to an adversary SSD hearing system. Given the various costs that would be imposed by a change to such a system, the burden of proof lies with those who would advocate for such a change. It is burden they have failed to carry.

III. FRAUD # 3: SOCIAL SECURITY'S VOCATIONAL ASSESSMENTS REFLECT THE REAL ECONOMY

SSA ALJ hearings employ a five-step sequential evaluation

¹³² See generally Steven K. Berenson, *From the Ashes of the Lawyer-Statesman Rises the Lawyer-Democrat: Practical Legal Wisdom from the Ground Up*, 2014 J. OF THE PROF. LAW. 17, 27.

¹³³ Robert E. Rains, *Professional Responsibility and Social Security Representation: The Myth of the State-Bar Bar to Compliance with Federal Rules on Production of Adverse Evidence*, 92 CORNELL L. REV. 363, 374 (2007).

process in determining whether a claimant is disabled.¹³⁴ First, the Judge asks whether the claimant is engaged in “substantial gainful activity.”¹³⁵ If the claimant is engaged in substantial gainful activity (SGA), they will be found “not disabled.”¹³⁶ SGA is determined based upon the amount of one’s earnings from employment. For 2015, if a sighted person earns more than \$1,090 per month,¹³⁷ they will be determined to be engaged in SGA and will be found not to be disabled. Thus, at the current federal minimum wage of \$7.25 per hour,¹³⁸ a person will not be found to be disabled if the person who works an average of 35 hours per week. If a person makes less than the SGA threshold, they will proceed to the second step of the sequential evaluation process.

Second, a judge must determine if the claimant has a “severe” medically determinable mental or physical impairment.”¹³⁹ Use of the term “severe” would seem to imply that a fairly significant threshold must be met in order to satisfy this step of the process. In fact, however, the medical inquiry at this second stage of the disability evaluation process is quite *de minimus*. According to SSD regulations, impairment is severe if it “significantly limit[s]” a person’s “mental or physical ability to do basic work activities.”¹⁴⁰ In practice, virtually any identifiable medical condition, whether mental or physical, will be found to rise to the level of severity required to allow the claimant to progress to the next step of the evaluation process.¹⁴¹

The third step represents a major hurdle for claimants, in that it

¹³⁴ See Frank S. Bloch, *Medical Proof, Social Policy, and Social Security’s Medically Centered Definition of Disability*, 92 CORNELL L. REV. 189, 211 (2007) (hereinafter, Bloch, *Medically Centered*); Jon C. Dubin, *Overcoming Gridlock: Campbell After a Quarter-Century and Bureaucratically Rational Gap Filling in Mass Justice Adjudication in the Social Security Administration’s Disability Programs*, 62 ADMIN. L. REV. 937, 972 (2010) (hereinafter, Dubin, *Gridlock*); Dubin, *Labor Market*, *supra* note 33, at 50; Griffin, *supra* note 37, at 154-55.

¹³⁵ Bloch, *Medically Centered*, *supra* note 134, at 212; Dubin, *Gridlock*, *supra* note 134, at 973; Dubin, *Labor Market*, *supra* note 33, at 32; Griffin, *supra* note 37, at 155; 20 C.F.R. § 404.1571.

¹³⁶ Griffin, *supra* note 37, at 155.

¹³⁷ See *Substantial Gainful Activity*, SSA, <http://www.socialsecurity.gov/oact/COLA/sga.html> (last visited Jan. 8, 2015) (“The monthly SGA amount for statutorily blind individuals for 2015 is \$1,820.”).

¹³⁸ *Wage and Hour Division*, DEP’T OF LABOR, <http://www.dol.gov/whd/minimumwage.htm> (last visited Mar. 21, 2014).

¹³⁹ Bloch, *Medically Centered*, *supra* note 134, at 212. See also Dubin, *Gridlock*, *supra* note 134, at 973; Dubin, *Labor Market*, *supra* note 33, at 32; Griffin, *supra* note 37, at 155.

¹⁴⁰ 20 C.F.R. § 404.1521.

¹⁴¹ Dubin, *Gridlock*, *supra* note 134, at 973.

asks whether the claimant's disability rises to the level of one of the SSA's "listing of impairments."¹⁴² The SSA has propounded listings of a variety of medical impairments, along with the criteria that must be satisfied in order for the listing to be "met."¹⁴³ These standards for meeting a listing are significantly high.¹⁴⁴ The standards are set up so that a determination that the claimant meets a listing is conclusive as to an inability to work, and therefore a claimant who meets a listing is determined to be disabled at this step of the evaluation process without regard to the claimant's age, education level or prior work experience, and with no need to proceed to the final two steps of the process.¹⁴⁵ Even if a claimant's disability does not "meet" a specific listing, if the claimant's disability is "equivalent" to a listing, meaning that "it is at least equal in severity and duration to the criteria of any listed impairment[,]" the claimant will be found to be disabled at this stage of the process.¹⁴⁶

However, if the claimant's medical issues are not significant enough to rise to the level of meeting or equaling one of the listings,¹⁴⁷ the ALJ must proceed to the fourth step of the evaluation process. This, along with the final step in the process explicitly brings the question of vocational assessments into the mix, and focuses on the claimant's residual functional capacity (RFC).¹⁴⁸ The claimant's RFC is the claimant's remaining ability to perform certain work functions despite the claimant's impairments.¹⁴⁹ The fourth step in the evaluation process asks whether, given the claimant's RFC, the claimant can return to her

¹⁴² Bloch, *Medically Centered*, *supra* note 134, at 212; Dubin, *Gridlock*, *supra* note 134, at 973-74; Dubin, *Labor Market*, *supra* note 33, at 32-33; Griffin, *supra* note 37, at 155.

¹⁴³ Listing of impairments, SSA <http://www.ssa.gov/disability/professionals/bluebook/AdultListings.htm> (last visited Mar. 24, 2014).

¹⁴⁴ Dubin, *Gridlock*, *supra* note 134, at 974; Dubin, *Labor Market*, *supra* note 33, at 33.

¹⁴⁵ *Id.*

¹⁴⁶ See BLOCH ON SOCIAL SECURITY § 3:26, quoting 20 C.F.R. §§ 404.1526(a), 416.926(a).

¹⁴⁷ Multiple impairments can be aggregated so that even if no one impairment alone meets a listing, the cumulative effect may be equivalent to a listing and thus may result in a finding of disability. See 20 C.F.R. § 416.923.

¹⁴⁸ Bloch, *Medically Centered*, *supra* note 134, at 213; Dubin, *Gridlock*, *supra* note 134, at 974; Dubin, *Labor Market*, *supra* note 33, at 33; Griffin, *supra* note 37, at 156.

¹⁴⁹ Bloch, *Medically Centered*, *supra* note 134, at 213; Dubin, *Gridlock*, *supra* note 134, at 974; Dubin, *Labor Market*, *supra* note 33, at 33; Griffin, *supra* note 37, at 156.

prior work.¹⁵⁰ If the answer to this is yes, the claimant is not disabled, because by definition they should be able to return to prior work and the ALJ does not proceed to step five.¹⁵¹ However, if the answer is no, then the final step in the evaluation asks whether, based on the claimant's RFC, their age, education level and prior work experience, they can perform any job available in significant numbers in the national economy.¹⁵² If the answer to this question is yes, then the claimant is not disabled.¹⁵³

These final two steps of the evaluation process are to a large degree mandated by the language of the Social Security Act itself. The Act states:

An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.¹⁵⁴

The 1967 Social Security Amendments added the provision to the Act.¹⁵⁵ For the first time, this language made explicit the mandate that a vocational assessment is a necessary part of the disability determination process.¹⁵⁶ One key to the determination of disability at the final stage of the process is the Medical Vocational Disability Guidelines, or Grids promulgated by the SSA.¹⁵⁷ The Grids are a series of tables that specify, given the claimant's RFC, their age, level of education and prior work experience, whether a

¹⁵⁰ Bloch, *Medically Centered*, *supra* note 134, at 213; Dubin, *Gridlock*, *supra* note 134, at 975; Dubin, *Labor Market*, *supra* note 33, at 34; Griffin, *supra* note 37, at 156.

¹⁵¹ Bloch, *Medically Centered*, *supra* note 134, at 213; Dubin, *Gridlock*, *supra* note 134, at 975; Dubin, *Labor Market*, *supra* note 33, at 34; Griffin, *supra* note 37, at 156.

¹⁵² Bloch, *Medically Centered*, *supra* note 134, at 213; Dubin, *Gridlock*, *supra* note 134, at 976; Dubin, *Labor Market*, *supra* note 33, at 34; Griffin, *supra* note 37, at 156.

¹⁵³ Bloch, *Medically Centered*, *supra* note 134, at 213; Dubin, *Gridlock*, *supra* note 134, at 975; Dubin, *Labor Market*, *supra* note 33, at 34; Griffin, *supra* note 37, at 156.

¹⁵⁴ 42 U.S.C. §423(d)(2)(A) (2006).

¹⁵⁵ Dubin, *Gridlock*, *supra* note 134, at 948; Dubin, *Labor Market*, *supra* note 33, at 23-24.

¹⁵⁶ Dubin, *Gridlock*, *supra* note 134, at 948; Dubin, *Labor Market*, *supra* note 33, at 25.

¹⁵⁷ Bloch, *Medically Centered*, *supra* note 134 on Social Security § 3:31.

sufficient number of jobs exist in the national economy to satisfy the statutory standard set forth above for determining a person not to be disabled.¹⁵⁸

A look at how the grids applied in Major's case will clarify their use. A claimant's physical RFC is a determination of their strength related capacity to engage in activities that may be required of certain occupations, including the ability to sit or stand for specified durations of time, and the ability to walk, lift, carry, push or pull certain amounts of weight.¹⁵⁹ Various combinations of different ability levels with regard to each of these tasks are taken to describe the ability to perform different types of work. Thus, a person is deemed able to perform sedentary work if the person can sit for up to six hours in an eight hour work day, stand and walk for up to two hours and lift up to ten pounds occasionally.¹⁶⁰ "Light work involves standing and walking for up to six hours and lifting up to twenty pounds with pushing and pulling of arm and leg controls while seated; medium work is light work with lifting up to fifty pounds; heavy and very heavy work involves lifting up to or over one hundred pounds, respectively."¹⁶¹

In an RFC assessment of Major performed by a SSA contracted physician, it was determined that Major can lift up to ten pounds frequently, and up to 20 pounds occasionally. It was also determined that he can both sit and stand or walk for up to six hours out of an eight hour day. Such assessments lead to the conclusion that Major is able to do light work. However, the RFC assessment also concluded that Major's ability to push and/or pull with his lower extremities was limited due to chronic left heel pain with possible Reflex Sympathy Dystrophy. This suggested a finding that Major would be limited to sedentary work. However, as will be discussed in greater detail below, the ALJ at Major's hearing chose to disregard the SSA contracted doctor's assessment of Major's lower extremity limitations, and treated Major as being able to perform light work.

Turning to the grid for light work,¹⁶² Major's status as disabled or not disabled would be determined by his age, education level and prior work experience.¹⁶³ Given Major's age of 49 at the time

¹⁵⁸ Bloch, *Medically Centered*, *supra* note 134, at 217; Dubin, *Gridlock*, *supra* note 134, at 976; Dubin, *Labor Market*, *supra* note 33, at 35.

¹⁵⁹ Dubin, *Gridlock*, *supra* note 134, at 974-75; Dubin, *Labor Market*, *supra* note 33, at 33.

¹⁶⁰ Dubin, *Gridlock*, *supra* note 134, at 975 n.149.

¹⁶¹ *Id.*

¹⁶² 20 C.F.R. Part 404 Subpart P Appx 2 (Guidelines) § 202, available at http://www.ssa.gov/OP_Home/cfr20/404/404-app-p02.htm, last visited July 1, 2014.

¹⁶³ Dubin, *Labor Market*, *supra* note 33, at 36.

of the hearing (considered a “younger individual” under the grids’ parlance),¹⁶⁴ and given his high school diploma, he would be considered not disabled under the grids regardless of his prior work experience.¹⁶⁵ Note that the result would have been the same under the grids had the ALJ determined that the “sedentary work” grid should be used.¹⁶⁶ On the other hand, under the sedentary work grid, if Major’s hearing had been delayed by approximately four months until after he turned 50, then the sedentary grid would result in a finding of disabled.¹⁶⁷

The grids add an element of certainty to what was previously an extremely variable process. Between promulgation of the Social Security Act Amendments in 1967, and adoption of the grids in 1978, the now mandatory vocational assessment performed as part of the disability determination involved an often inconsistent application of the official notice doctrine, as applied to certain U.S. Department of Labor publications, and the use of vocational expert testimony at ALJ hearings.¹⁶⁸

Nonetheless, at least two serious problems result from current usage of the grids in disability determinations. First, the grids only assess exertional limitations on employability.¹⁶⁹ However, an increasingly large percentage of SSD cases involve non-exertional limitations, including mental health issues, in addition to exertional ones.¹⁷⁰ Pain is another prominent non-exertional limitation that may impact a claimant’s ability to work, which is not addressed by the grids.¹⁷¹ Thus, vocational evidence beyond the grids is required in cases involving such non-exertional limitations.

Second, the grids are based on grossly outdated data derived from an economy that bears little resemblance to the current one. When the grids were promulgated in 1978, they were based largely upon data from the United States Department of Labor’s 1965

¹⁶⁴ See Swank, *Five Small Steps*, *supra* note 62, at 160.

¹⁶⁵ 20 C.F.R. Part 404 Subpart P Appx 2 (Guidelines) § 202.20, available at http://www.ssa.gov/OP_Home/cfr20/404/404-app-p02.htm, last visited July 1, 2014.

¹⁶⁶ 20 C.F.R. Part 404 Subpart P Appx 2 (Guidelines) § 201.27, available at http://www.ssa.gov/OP_Home/cfr20/404/404-app-p02.htm, last visited July 1, 2014.

¹⁶⁷ 20 C.F.R. Part 404 Subpart P Appx 2 (Guidelines) § 201.12, available at http://www.ssa.gov/OP_Home/cfr20/404/404-app-p02.htm, last visited July 1, 2014.

¹⁶⁸ Dubin, *Gridlock*, *supra* note 134, at 950-71.

¹⁶⁹ Dubin, *Gridlock*, *supra* note 134, at 976; Nathaniel O. Hubley, Note, *The Untouchables: Why a Vocational Expert’s Testimony in Social Security Disability Hearings Cannot be Touched*, 43 VAL. U. L. REV. 353, 375 (2008).

¹⁷⁰ Dubin, *Gridlock*, *supra* note 33, at 943.

¹⁷¹ *Id.*

Dictionary of Occupational Titles (DOT).¹⁷² The grids have not been updated since that time. In the words of scholar Jon Dubin:

The grid continues to rely on woefully outdated assumptions drawn from a snapshot of the United States' economy nearly a half-century ago. It has not been meaningfully updated to account for dramatic changes in today's dynamic and fluid twenty-first-century economy and labor market.¹⁷³

Aside from the question of staleness, other scholars have questioned the validity of the information relied upon by the SSA in creating the grids, even when that information was timely.¹⁷⁴

In cases where the grids are not determinative, ALJs often rely on the testimony of vocational experts (VE's).¹⁷⁵ However, presently, no generally accepted standards exist to determine who qualifies as a VE in terms of training, experience or supervision.¹⁷⁶ Moreover, it is unclear whether the methods employed in the relatively new field of vocational studies rise to a level of reliability that warrants the degree of deference ALJs accord to VE testimony.¹⁷⁷ Indeed, VE testimony often relies largely on the same outdated DOT data that underlies the grids.¹⁷⁸ At least one writer has persuasively argued that the same VE testimony that is relied on in SSD hearings would be inadmissible in most courts under the prevailing *Daubert* test for the admissibility of expert testimony.¹⁷⁹

The national focus of SSD's vocational assessment phase also seems misguided. As quoted above,¹⁸⁰ the Social Security Act requires a person to be found not to be disabled if there are a sufficient number of jobs the person can perform in the national economy, even if no such jobs exist in the region or locality in which the claimant resides. Yet disabled individuals with no income generally lack the means to relocate to another part of the country for a job that is not available in their locality.

Another significant problem with the vocational aspect of the SSD system is its "all or nothing nature." Even a claimant who is found to be disabled, but only eligible to receive SSI benefits, can look forward to an income stream that is minimally adequate on

¹⁷² Dubin, *Labor Market*, *supra* note 33, at 2-3.

¹⁷³ Dubin, *Labor Market*, *supra* note 33, at 4.

¹⁷⁴ Dubin, *Labor Market*, *supra* note 33, at 4-5.

¹⁷⁵ See Hubley, *supra* note 169, at 375.

¹⁷⁶ Dubin, *Labor Market*, *supra* note 33, at 968; Hubley, *supra* note 169, at 355.

¹⁷⁷ Hubley, *supra* note 169, at 355. *Id.*

¹⁷⁸ *Id.* at 369-70.

¹⁷⁹ *Id.* at 396.

¹⁸⁰ See *supra* note 154 and accompanying text.

which to survive, along with health insurance.¹⁸¹ On the other hand, an unsuccessful claimant is left largely on her own to find a job with little if any assistance from the federal government.¹⁸² If this is the result following an ALJ decision, by this time the claimant has likely been out of the work force for a period of years, because working while the claim was pending would likely have jeopardized the applicant's chances of success.¹⁸³ The challenge for a person with at least some level of disability to return to the workforce after a lengthy absence with little government assistance is especially daunting.¹⁸⁴

Scholars point out the tension between the SSD program's recognition that certain people should be excused from the general social obligation to work to support oneself as a result of disability, and the Americans with Disabilities Act's premise that persons with disabilities have historically been discriminated against in employment markets, and that such persons often are able and willing to work given appropriate accommodations from employers.¹⁸⁵ While the SSA does offer a small number of programs to help to encourage SSD recipients to return to the workforce,¹⁸⁶ few beneficiaries actually take advantage of these programs.¹⁸⁷ Moreover, because the SSD system is funded through

¹⁸¹ SSI recipients' income is sufficiently low that most also qualify for the Supplemental Nutritional Assistance Program (SNAP), formerly known as Food Stamps. See United States Department of Agriculture webpage at <http://www.fns.usda.gov/snap/eligibility>, last visited July 29, 2014.

¹⁸² States and localities do offer a patchwork of vocational rehabilitation programs designed to assist persons with disabilities to obtain employment. See David Wittenburg, David R. Mann & Allison Thompson, *The Disability System and Programs to Promote Employment for People With Disabilities* (2013), available at <http://link.springer.com/article/10.1186/2193-9004-2-4/fulltext.html>, last visited August 12, 2014. However, the disjointed nature of such programs serves to limit greatly their effectiveness. *Id.* at 3.

¹⁸³ Gregory Acs, *Responding to Long-Term Unemployment* 5 (Urban Institute Paper 2013), available at <http://www.urban.org/UploadedPDF/412888-responding-to-long-term-unemployment.pdf>, last visited July 30, 2014; David H. Autor, *The Unsustainable Rise of the Disability Rolls in the United States: Causes, Consequences and Policy Options*, 9-10 (MIT Working Paper, Nov. 2011) (hereinafter Autor, *Unsustainable*), available at <http://economics.mit.edu/files/7388>, last visited July 29, 2014.

¹⁸⁴ *Id.*

¹⁸⁵ See, e.g., *Id.* at 5; Edward Berkowitz, Implications for Income Maintenance Policy, in Implementing the Americans with Disabilities Act 193, 195 (Jane West Ed. 1996); Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans With Disabilities Act and Federal Disability Benefits Programs*, 76 TEX. L. REV. 1003, 1059-75 (1998); Dubin, *Labor Market Side*, *supra* note 33, at 59 & n. 245.

¹⁸⁶ See Autor, *Unsustainable*, *supra* note 183, at 12 (discussing the Ticket to Work program); Morton, *supra* note 62, at 333.

¹⁸⁷ *Id.*

a non-experience rated payroll tax,¹⁸⁸ this offers a perverse incentive for employers not to provide significant workplace accommodations and other assistance to help disabled adults to stay in the workforce, rather than to leave employment and seek SSD benefits.¹⁸⁹

Over the decades since the grids were adopted, the United States' economy has transformed from a manufacturing based economy to a service and knowledge based one. In some sense, the lessened need for physical labor has increased the opportunities for disabled persons to participate in the labor force.¹⁹⁰ Indeed, some argue that the decreased need for physical labor should result in fewer favorable disability determinations rather than the trend toward increased disability findings in recent years.¹⁹¹ However, the educational requirements for such jobs, as well as the need to adapt to rapid technological changes have left many disabled persons, particularly those with cognitive impairments, left behind.

Indeed, there is a broad consensus that the economic crisis of 2008, along with longer term structural changes to the American economy, placed great strains upon the SSD system, in terms of large increases in the number of persons applying for benefits, the number of persons receiving such benefits and the corresponding fiscal soundness of the system.¹⁹² According to a recent Congressional Research Service study, SSDI applications increased by 27.3% during the most recent recession (December 2007 – June 2009).¹⁹³ The fact is that the SSD system is being called on to provide a “social safety net” for a proportion of the population far beyond that which was anticipated when the program was created.

Part of the reason for the current strains on the SSD system is the inadequacy of the rest of the “social safety net” for many of those who have recently applied for SSD benefits. For someone

¹⁸⁸ Simply stated, experience rating is a method of setting insurance premiums based upon the insured's claims history. See J.F. Follman, Jr., *Experience Rating v. Community Rating*, 29 THE J. OF INSURANCE 403, 403 (1962) (citations omitted). Thus, automobile insurance policies are experience rated: the more accidents you have, the higher your premiums. By contrast, employers pay the same percentage of each employee's wages in SSD taxes regardless of how many of the employer's employees file claims for SSD benefits. If employers could lower their SSD payments by keeping more of their employees on the job, they might make greater efforts to do so.

¹⁸⁹ Autor, *Unsustainable*, *supra* note 183, at 8.

¹⁹⁰ *Id.* at 2.

¹⁹¹ *Id.*

¹⁹² See, e.g., Swank, *Five Small Steps*, *supra* note 62, at 155. See also Morton, *supra* note 62, at 13 & n.70 (2013) (citing studies showing positive correlation between unemployment rate and SSDI application rate).

¹⁹³ *Id.* at 13-14.

who lost her job due to the 2008 recession, outsourcing or technological change in his or her field, Unemployment Insurance (UI) is generally the first place to turn for immediate assistance. While the government extended the number of weeks one can collect UI benefits in the wake of the 2008 recession, at present, one can receive UI benefits for a total of up to 46 weeks, the same duration that was in effect prior to the 2008 recession.¹⁹⁴ Naturally, it makes sense that one might apply for SSD benefits after one has exhausted their UI benefits,¹⁹⁵ particularly given that there are virtually no other income support programs available for anyone other than very poor persons with minor children.¹⁹⁶

Many blame the failures of our country's K-12 education system for the difficulties unemployed workers have had in adjusting to the demands of our new economy. Such a critique is beyond the scope of our present inquiry. However, others connect these shortcomings and our rapidly changing economy to the need to develop a more robust system for offering job retraining and

¹⁹⁴ See generally Maria Canon & Yang Liu, *The Effects of Extending Unemployment Insurance Benefits*, ECONOMIC SYNOPSES (2014), available at http://research.stlouisfed.org/publications/es/14/ES_16_2014-07-03.pdf, last visited July 7, 2014; Jesse Rothstein, *Unemployment Insurance and Job Search in the Great Recession*, Brookings Papers on Economic Activity, Fall 2013, pp. 143-210, available at http://www.brookings.edu/about/projects/bpea/editions/~media/Projects/BPEA/Fall%202011/2011b_bpea_rothstein.PDF, last visited July 7, 2014.

¹⁹⁵ At least one researcher has found that extensions in the availability of UI benefits tend to delay applications for SSD, which in turn saves the SSD program money, both in the short term, because potential applicants receive UI rather than SSD benefits, but also in the long term, because some potential SSD applicants find jobs during the extended period of UI benefits. See Matthew S. Rutledge, *The Impact of Unemployment Insurance Extensions on Disability Insurance Application and Allowance Rates* (Center for Retirement Research at Boston College 2011), available at http://crr.bc.edu/wp-content/uploads/2011/10/wp_2011-17-508.pdf, last visited July 30, 2014.

¹⁹⁶ People with minor children might be eligible for the Temporary Assistance to Needy Families Program. See generally www.tanfprogram.com, last visited July 7, 2014. Even if ineligible for TANF, very poor individuals will likely qualify for Supplemental Nutritional Assistance Program (SNAP), formerly known as food stamps. However, SNAP benefits were only \$189 per month for a single person as of 2014. See United States Department of Agriculture webpage at <http://www.fns.usda.gov/snap/eligibility>, last visited July 7, 2014. Another major inducement to apply for SSD benefits came from the fact that those awarded benefits were also granted health care benefits under the Medicare or Medicaid program. See Morton, *supra* note 60, at 16. While this inducement may be lessened by the Affordable Care Act's extension of Medicaid benefits and other low cost health insurance options to many who were previously ineligible for benefits, *id.*, many states have declined to accept the federal government's offer of funding to extend their Medicaid programs. Thus, the ultimate impact of the ACA on the lure to apply for SSD in order to obtain health care coverage remains uncertain. *Id.*

placement services to the long term unemployed and those with mild to moderate disabilities,¹⁹⁷ who are leading candidates to apply for SSD without other alternatives to provide income. In any event, it seems clear that the SSD program is increasingly being called upon to provide a “social safety net” for displaced workers, rather than its initial purpose of providing an insurance program for medical impairments.¹⁹⁸

IV. MAJOR’S CASE

A closer look at Major’s case will further illustrate the fallacy of the above-described myths, as well as highlight the need for reform to the SSD system. First, the denial of benefits in Major’s case silences the myth that it is easy to get SSD benefits. Major has not received a paycheck in nearly 20 years. He has been diagnosed by licensed medical doctors with at least the following mental conditions in addition to his physical limitations: Depression, Post-Traumatic Stress Disorder, Anxiety Disorder, Personality Disorder and Substance Abuse Disorder. He has been involuntarily committed to inpatient hospitals following suicide attempts on multiple occasions. The VA has determined that his military service-connected disabilities limit his earning capacity by 80%, which is to say nothing about his non-service connected disabilities. Major was homeless and living on the streets for an extended period of time prior to his entry in his current rehabilitation program. If Major’s circumstances are not enough to qualify him for disability benefits, it is clearly erroneous to describe obtaining such benefits as easy.

It is also clear that the fact that Major was represented by counsel at the ALJ hearing did not result in the Agency being “overmatched,” or an unfair process in Major’s favor. It is true that Major’s actual advocate at his hearing was a law student rather than a lawyer. But, for reasons discussed above,¹⁹⁹ representation at the ALJ hearing by a non-lawyer, acting under the supervision of an attorney seems to be the new norm at ALJ hearings. Also, while the supervising attorney in Major’s case lacked extensive experience in SSD litigation, I was involved in a few prior such cases, and brought more than 25 years of legal practice and poverty-law practice experience to the case.

Also, as mentioned earlier,²⁰⁰ at the time our clinic agreed to take Major’s case, with only a week or so to go before his

¹⁹⁷ See, e.g., Wittenburg, Mann, & Thompkins, *supra* note 182.

¹⁹⁸ Autor & Duggan, *supra* note 66, at 87.

¹⁹⁹ See *supra* notes 123-27, and accompanying text.

²⁰⁰ See *supra* page 5.

scheduled hearing, the SSA had utterly failed in its duty to develop a full record to base a decision on.²⁰¹ All that was contained in the SSA file were medical records from the local VA for about a year from the date of Major's application in late 2010, through the end of 2011. Thus, the first task that our clinic undertook after getting Major's hearing continued was to collect the records from Major's numerous hospitalizations and other medical treatment over the past decade. We knew that Major had been hospitalized at least several times following suicide attempts, and that such attempts were factors that could contribute to a finding that Major met a listing for an affective disorder under section 12.04 of the listings of impairments.²⁰² Eventually, we were able to compile and submit more than 1,000 pages of medical records, the volume of which caused the ALJ, acting *sua sponte*, to continue the hearing for another two months to allow him to review this evidence.²⁰³

Another task the clinic undertook in order to prepare the case for hearing was to contact Major's treating medical providers to provide opinion letters about Major's impairments. Although Major had a physical RFC assessment by an SSA contracted doctor in the lead up to his case,²⁰⁴ Major had not received notice of a scheduled SSA psychiatric evaluation due to his homelessness. Thus, there was no specific mental health evaluation included in the SSA's work-up of the case. Opinions from treating doctors may be particularly important in the SSD process because their opinions are, by rule, entitled to greater weight than the SSA's own doctors, who have only examined the applicant once for purposes of the SSD claim, and even greater weight than a testifying medical expert at the ALJ hearing, who has likely only conducted a paper review of the claimant's case, and has not examined the claimant directly.²⁰⁵

Working with Major's treating doctors proved to be a challenge, as it often is in SSD cases. Busy doctors naturally prefer to spend as much of their time treating patients as is possible, and

²⁰¹ SSD experts Frank Bloch, Jeffrey Lubbers, and Paul Verkuil have contended that failure to develop a full record on which to decide cases is one of the greatest failings of the SSD adjudication system. See Bloch, *et al.*, *Full and Fair*, *supra* note 67, at 53. However, rather than recommending adversarial attorney representation for the SSA as Judge Frye and others have, Bloch, Lubbers, and Verkuil have proposed adding a non-adversary, SSA "Counselor" to the hearing process whose primary role would be to ensure that the ALJ has a complete record upon which to base her decision. *Id.* at 60.

²⁰² See *supra* note 143.

²⁰³ Carina Weng also points out that many low income SSD applicants, who have not had regular access to health care, may lack medical records to document clear disabilities.

²⁰⁴ See *supra* notes 159-61 and accompanying text.

²⁰⁵ BLOCH ON SOCIAL SECURITY §§ 5:7- 5:8.

little time writing letters or preparing documents for administrative purposes. Major regularly saw both a psychiatrist and a psychologist at the VA, as well as a primary care physician. Doctors are often particularly overwhelmed by the volume of patients they are required to treat in public settings such as the VA. Furthermore, delays and other problems within the VA health care system were very much in the news during the period relevant to Major's case.²⁰⁶

From a lawyer's perspective, a letter from a doctor is most effective when it refers to specific evidence from the applicant's treatment records, and then connects that evidence to particular requirements of the SSA Listings. Indeed, many lawyers likely prefer to sketch out a first draft of such a letter themselves for the treating physician to review, edit and finalize. By contrast, many doctors are reluctant to sign a letter drafted for them by an attorney. While such doctors would prefer to draft their own letters, they often lack the resources, both in terms of time and ability to connect medical facts to relevant legal standards, or to write such assessments in a comprehensible way, like lawyers. Each of these limitations occurred with Major's VA doctors. At the end of the day, we were required to settle for letters that amounted to little more than conclusory listings of the various mental and physical conditions Major was diagnosed with. While this was certainly enough in itself to get Major past the second step of the sequential evaluation process, there was little in these letters to help an ALJ find evidence that Major's impairments met or exceeded a listing.

Fortunately, Major was also receiving treatment from both a licensed clinical social worker at his rehabilitation program, as well as an acupuncturist. Because these professionals were more willing to work with Major's lawyers in drafting letters for submission to the ALJ on Major's behalf, their letters did a better job of connecting medical evidence of record to the Listings. However, because these professionals are not medical doctors, their opinions hold less weight than those of the SSA doctors, and the testifying medical expert, even though the letter writers had treated the applicant, and the other doctors had not.²⁰⁷

Additionally, we were able to have an assessment of Major performed by a psychologist who had volunteered his services through the Give an Hour program. This program allows service

²⁰⁶ See, e.g., *Severe Report Finds V.A. Hid Waiting Lists*, NEW YORK TIMES, May 29, 2014, at A1 (discussing VA Inspector General's Report regarding significant delays in providing medical care at Phoenix VA hospital and efforts made to cover up the fact of such delays).

²⁰⁷ See generally BLOCH ON SOCIAL SECURITY § 5:7.

providers to offer free services to needy veterans.²⁰⁸ Though this professional's letter also did a thorough job of connecting his observations of Major's symptoms to the Listings, it will hold less weight because of the fact that it was not offered by a professional who had regularly treated Major.

When one lawyer asks another lawyer about a case they are handling, the first question the lawyer always asks is: "Who is the judge?" That question may be even more pertinent in the case of SSD ALJ hearings than other types of proceedings. The overall success rate of claimants at the ALJ stage – 56% in 2013²⁰⁹ – masks huge disparities in the allowance rate of claims by different SSD ALJs. For example, in 2011, the Wall Street Journal reported that dozens of ALJs nationwide awarded benefits in more than 90% of their cases, while many others awarded benefits in fewer than 20% of their cases.²¹⁰ In such circumstances, luck of the draw can make a huge difference. In Major's case, the Judge ultimately assigned to the matter denied approximately 42% of the cases he heard during the most recent fiscal year,²¹¹ right about the average for all ALJs according to the Wall Street Journal.²¹²

Substance abuse turned out to be a huge issue in Major's case. Since the enactment of "welfare reform" in 1996, substance abuse, in and of itself, is not considered a disability that entitles one to receive SSD benefits, even if it prevents a person from working.²¹³ Moreover, even if the claimant can prove a disability other than substance abuse, benefits will be denied if substance abuse is determined to be a "contributing factor material to the determination of disability."²¹⁴ The medical expert in Major's case testified that while it was arguable in his opinion whether Major's mental health issues met at least some of the listings when Major was abusing alcohol and drugs, he was convinced that when sober, Major's mental health issues did not rise to the level of meeting any of the listings. The Judge placed great weight on this testimony, and ultimately reached the same conclusion, that Major only met the listings when abusing alcohol or drugs, at which time a finding of disability would be precluded due to the substance abuse.

²⁰⁸ See GIVE AN HOUR (giveanhour.org, last visited July 25, 2014), <http://www.giveanhour.org>.

²⁰⁹ See *supra* note 35.

²¹⁰ *Id.*

²¹¹ See *supra* note 39.

²¹² See *supra* note 34 and accompanying text.

²¹³ Warnecke Millar & Rebecca Griffin, Recent Development, *Adjudicating Addicts: Social Security Disability, the Failure to Adequately Address Substance Abuse, and Proposals for Change*, 64 ADMIN. L. REV. 967, 968-69 (2012).

²¹⁴ See 20 C.F.R. §§ 416.935(a), 404.1535(a).

Because the Judge found that Major did not meet a listing, it was necessary to move to the vocational aspect of the sequential evaluation process. This is where the third myth addressed above, that the SSD system makes genuine assessments of a person's ability to work, was proven false. The SSA's records indicated that Major had not received any reported earnings from employment since his discharge from the military nearly 20 years ago. At the hearing, Major testified that he had worked as a "ranch hand," during this period, a position that Major had confided in his attorneys amounted to little more than being a "gigolo" for a wealthy ranch owner. In any event, given Major's RFC as described above, the Judge and the vocational expert agreed that Major would not be capable of returning to his prior employment as a "ranch hand." The Judge then asked the vocational expert a hypothetical question designed to determine whether there were jobs in the national economy in sufficient numbers for a person with Major's RFC. The vocational expert responded by identifying three such jobs: eyedropper assembler,²¹⁵ addresser²¹⁶ and document preparer.²¹⁷

When the Judge modified his hypothetical to include the additional limitations recognized by the SSA's examining doctor based upon Major's lower extremity problems,²¹⁸ the vocational expert concluded that there would be no jobs in the national economy in sufficient numbers that Major would be able to perform. Despite this testimony, the Judge ultimately rejected the SSA's own doctor's conclusions regarding Major's lower extremity limitations, and found Major not to be disabled.

Major appealed the ALJ's decision to the SSA Appeals Council. It seemed that he had a number of solid issues to raise on appeal. One was that the Judge erred in disregarding literally all of the expert opinions provided on Major's behalf, on grounds that they were inconsistent with the Judge's ultimate conclusion that Major's mental health disabilities did not raise to the level of a

²¹⁵ According to the Dictionary of Occupational Titles (DOT), an eyedropper assembler "slips rubber bulbs over ends of glass tubes to form eyedroppers." See DOT 739.687-086, available at <http://www.occupationalinfo.org/73/739687086.html>, last visited July 11, 2014.

²¹⁶ According to DOT 209.587-010, available at <http://www.occupationalinfo.org/20/209587010.html>, last visited July 11, 2014, an addresser "[a]ddresses by hand or typewriter, envelopes, cards, advertising literature, packages, and similar items for mailing."

²¹⁷ According to DOT 249.587-018, available at <http://www.occupationalinfo.org/24/249587018.html>, last visited July 11, 2014, a document preparer "[p]repares documents, such as brochures, pamphlets, and catalogs, for microfilming, using paper cutter, photocopying machine, rubber stamps, and other work devices"

²¹⁸ See *supra* notes 159-163 and accompanying text.

listing in the absence of substance abuse. It certainly seems to “put the cart before the horse” to disregard an opinion as being inconsistent with the judge’s ultimate conclusion. Shouldn’t the opinion be considered first in reaching the conclusion, or be disregarded as unreliable on other grounds? Further, the Judge’s sole reliance on the testifying expert seemed to disregard SSA policies regarding the weight to be assigned to the opinions of treating and examining doctors, as opposed to those who have never met the claimant.²¹⁹

Additionally, the Judge’s disregard of the findings of SSA’s own examining doctor relating to additional functional limitations also seemed suspect. There appears to be no basis upon which to distinguish between that doctor’s conclusions as to Major’s abilities to sit, walk, lift, stand, etc., which the Judge credited, and the other findings regarding Major’s lower extremity limitations, which the Judge rejected.²²⁰

Despite these arguments, the Appeals Council denied Major’s appeal within days of its submission. This was rather shocking, given the typically long wait times prior to receiving an Appeals Council decision.²²¹ Major has now filed for federal court review of his SSD denial. However, the scope of review of SSD decisions in federal court is relatively narrow. The court must uphold the SSA decision as long as there is substantial evidence in the record to support its conclusion, even if the greater weight of the evidence would require a decision to the contrary.²²²

The decision to reject Major’s disability application on the basis that he is not disabled is most objectionable because it is unrealistic to assert that people with physical limitations, depression, PTSD and personality disorders can readily find employment assembling eyedroppers, addressing envelopes or cutting up documents for microfilming. In reality, these jobs simply do not exist, and even if the jobs did exist, no employer would be likely to offer a job to Major performing one of these tasks. To a certain extent, Major’s individual lack of employability is rendered irrelevant to the SSD process by the statutory language that states whether a particular person would actually be hired for a job available in sufficient numbers in the National economy is irrelevant to the disability determination. However, it is just this type of fictitious determination that cries out for reform of the system.

²¹⁹ See 20 C.F.R. § 404.1527(c)(2).

²²⁰ The opinions of a physician who has examined the claimant are also supposed to be given greater weight than those of a doctor who has not examined the claimant. *Id.* at § 404.1527(c)(1).

²²¹ See *supra* note 53 and accompanying text.

²²² 42 U.S.C. § 405(g); Bloch on Social Security § 6:2.

V. SUGGESTED REFORMS

The foregoing discussion serves to refute the three SSD frauds addressed here. First, it is far from easy for most claimants to obtain SSD benefits. The frauds perpetrated in New York are certainly galling, but there is little evidence to suggest that frauds on this scale are a frequent occurrence throughout the system. The statistics discussed in Part I of this paper make clear that most applications for SSD benefits are unsuccessful, and that even successful claimants often must endure lengthy delays and complicated procedural hurdles before their claims are approved. Moreover, there is reason to believe that it is often the most vulnerable claimants who suffer the most from the lengthy and complex SSD application process. Certainly efforts should be made to investigate, punish and deter fraudulent claims. But restricting access to the system other than through a review of substantive eligibility standards will likely hurt the most vulnerable applicants to the greatest degree, and defeat the objectives that supported adoption of the disability program in the first place.

Similarly, there is no empirical evidence whatsoever that providing the SSA with its own attorneys would improve outcomes in SSD cases, at least in terms of obtaining more accurate results. We do know that a major transition from the current inquisitorial system to an adversary system would impose significant transaction costs on an already financially strapped system. Moreover, paying a whole new staff of SSA attorneys going forward would impose similar additional costs on the Administration. Without any solid proof that the system would be improved, these costs are unwarranted. Rather, as a classic “repeat player,” the Administration holds significant systemic advantages over the “one-shotter” claimants in SSD hearings. This is true even in cases of represented claimants. The representation that claimants receive often falls short of the high quality legal representation that would no doubt be afforded to the SSA if it were to employ attorneys to represent it in all cases. Thus, providing attorney representation to the SSA would only serve to exacerbate the advantages the Administration currently has in SSD hearings.

Unlike the first two SSD frauds previously rebutted, the third fraud, that the SSD adjudication system involves a *bona fide* and reliable vocational assessment, calls for change to the current system. There is little dispute that the fourth and fifth stages of the SSA’s five step sequential evaluation process rely on grossly outdated data that was of questionable validity even when it was current. Further, in lieu of reliable statistical data, the opinions of the so-called vocational “experts” who testify in the absence of

such data lack the reliability we demand of expert testimony in other adjudicatory contexts. Any system that can honestly conclude that Major, despite all of his ailments, can obtain gainful employment assembling eyedroppers is a system in serious need of reform.

Rutgers-Newark law professor Jon Dubin has been perhaps the most articulate scholar with regard to both understanding and critiquing the current SSD system in general,²²³ and the vocational aspects of the system in particular.²²⁴ Dubin advocates for a “mend it don’t end it” approach by which the grids would be updated and improved, but not dispensed of entirely, while recognizing the significant limitations of the grids, including the staleness of the data on which grids are based, and the inability to fully establish the outcome in cases involving non-exertional limitations.²²⁵

However, Dubin’s writings, which are now a few years’ old, fail to adequately account for the political and economic pressures on the SSD system that have continued to grow along with the size and cost of the applicant pool and disability rolls in light of the 2008 economic crises and the continuing rapid changes in American employment markets. Moreover, his optimism that the SSA can update the grids in a manner that will bring them into line with the modern economy is belied by Dubin’s descriptions of the SSA’s repeated failures to do so despite past efforts.²²⁶ Finally, Dubin’s narrow focus on the SSD system fails to acknowledge the broader inadequacies: 1) in our education system’s ability to prepare future workers for the modern economy; 2) in our social safety net for unemployed and displaced workers; and 3) in our lack of comprehensive national program of vocational and continuing education for disabled and displaced workers, and a system to assist such workers with transitional employment services. Even improved grids will not allow the SSD system, as currently constructed, to account for all of these failures.

Therefore, the Social Security Act should be amended to eliminate the vocational aspect of SSD determinations – the fourth and fifth steps of the sequential evaluation process.²²⁷ Thus, SSD claimants who are not engaged in SGA and who meet or equal a listing would be granted benefits, while all others would be

²²³ See Dubin, *Issue Exhaustion*, *supra* note 68, at 1289.

²²⁴ See Dubin, *Labor Market Side*, *supra* note 33, at 1; Dubin, *Overcoming Gridlock*, *supra* note 134, at 937.

²²⁵ Dubin, *Labor Market Side*, *supra* note 33, at 62.

²²⁶ *Id.* at 38-47.

²²⁷ A similar proposal was offered by the Reagan administration, but was never enacted. See Dubin, *Labor Market Side*, *supra* note 33, at 48.

denied.²²⁸ Note that while the SSD listings of impairments are much more current than the grids, they have not been updated for more than ten years in the case of physical disorders, and 15 years in the case of mental disorders.²²⁹ Certainly, the listings must be updated to reflect current medical understandings to the extent the listings become the final step in the SSD evaluation process. Updated listings hold out the promise of more accurate disability determinations in the future.²³⁰

I do not intend to overstate the certainty and reliability of the medical aspects of disability determinations. While medical decisions based upon listings have an air of scientific realism, doctors and other scholars critiquing this issue assert that medical determinations of disability involve a host of discretionary and indeterminate factors.²³¹ On the other hand, most would agree that the elements of discretion and uncertainty are even greater at the vocational stages of the sequential evaluation process.²³² Yet over the past few decades, the number of initial allowances based on the Listings has plummeted, while the number of allowances based upon vocational factors has increased dramatically.²³³ William Morton, a research analyst who recently prepared a Congressional Research Service Report for Congress on the Growth of the SSDI rolls, attributes this to the outdated medical listings (even though the vocational data SSA relies on is even more outdated).²³⁴ In any event, greater reliance on updated medical listings will likely decrease uncertainty and indeterminacy of the system without entirely eliminating it.

Naturally, rendering those who would have been found disabled at the fourth and fifth stages of the sequential evaluation ineligible for benefits will greatly reduce those eligible to receive benefits, potentially solving the economic crisis that the SSD system currently faces. However, simply cutting off those who may have previously received benefits is not a humane way to solve the problem. Consistent with the values behind the ADA, those found not to be medically disqualified from work would need to be provided with a robust system of assistance that would include job training and placement services, supportive employment services where needed and cash assistance during the

²²⁸ I would impose this change prospectively, so no one who is currently receiving benefits, or who applied under the old system would have the new standard applied to them.

²²⁹ Morton, *supra* note 62, at 28.

²³⁰ *Id.* at 28-29.

²³¹ See Bloch, *Medically Centered*, *supra* note 134.

²³² Hubley, *supra* note 169, at 353.

²³³ Morton, *supra* note 62, at 28.

²³⁴ *Id.*

transition from unemployment to work.

CONCLUSION

The parallels between my proposal and the transition from the old AFDC program to the current TANF program seem evident. While “welfare reform” did result in dramatic reductions in welfare rolls, thus having positive immediate fiscal impact on government accounts, the broader goals of helping welfare recipients move from “welfare to work,” and therefore independence, do not seem to have been achieved.²³⁵ Limiting SSD to those who can meet a listing would certainly have the impact of reducing the rolls, and therefore address the fiscal and other public pressures on the system. However, it would only do so in a humane and socially responsible way if the vocational aspects of the system were replaced with a system of vocational training, rehabilitation and job placement services that effectively assist displaced workers in returning to the workforce, while also providing income support for those who are unable to do so despite good faith efforts.

Certainly, enacting a new major entitlement program of this scale is unlikely in the present political climate. However, as long as the SSD system is the only available social support for workers displaced by a combination of economic change and mental and physical limitations, the program will be stretched beyond its capacity to address compelling need beyond the scope of what the program was ever intended to address.

²³⁵ See e.g., Joel Berg, *Welfare Reform: The Promise Unfulfilled*, 11 J. GENDER, RACE & JUST. 47 (2007); Dubin, *Labor Market Side*, *supra* note 130, at 58 & n.243; Peter B. Edelman, *Changing the Subject from Welfare to Poverty to a Living Income*, 4 N.W. J.L. & SOC. POL’Y 14, 18-23 (2009).